134-276

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. 174

THE CHICAGO, MILWAUKEE, AND ST. PAUL RAILWAY COMPANY, APPELLANT,

vs.

THE THIRD NATIONAL BANK OF CHICAGO.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

FILED OCTOBER 13, 1886.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. 470.

THE CHICAGO, MILWAUKEE, AND ST. PAUL RAILWAY COMPANY, APPELLANT,

vs.

THE THIRD NATIONAL BANK OF CHICAGO.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, MARCH 12, 1889.

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1 Pleas in the circuit court of the United States for the northern district of Illinois, held at the United States court-rooms, in the city of Chicago, in the district aforesaid, before the Hon. Walter Q. Gresham, circuit judge of the United States for the seventh judicial circuit, on Monday, the first day of March, in the adjourned March term of said court, in the year of our Lord one thousand eight hundred and eighty-six, and of our Independence the one hundred and tenth year.

WM. H. BRADLEY, *Clerk.*

CHICAGO AND PACIFIC RAILROAD COMPANY and The Chicago, Milwaukee and St. Paul Railway Company vs. THIRD NATIONAL BANK OF CHICAGO, HUNTINGTON W. JACKSON, as Receiver of The Third National Bank of Chicago,	In Chancery. Bill.
and	
THIRD NATIONAL BANK OF CHICAGO vs. CHICAGO AND PACIFIC RAILROAD COMPANY and The Chicago, Milwaukee and St. Paul Railway Company and The Farmers' Loan and Trust Company.	Cross-Bill.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

2 Be it remembered that on the eighteenth day of October, 1882, came the complainants, by their solicitor, and filed in the office of the clerk of the circuit court of the United States for the northern district of Illinois, at Chicago, in said district, their bonds for costs and bill of complaint in said entitled cause; which said bond and bill are respectively in the words and figures following, to wit:

Bond.

UNITED STATES OF AMERICA, *Northern District of Illinois,* } *ss:*

Circuit Court. —— Term, A. D. 1882.

CHICAGO & PACIFIC R. R. CO. and CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY vs. THIRD NATIONAL BANK OF CHICAGO & HUNTINGTON W. JACKSON, Receiver, &c.	In Chancery.

I enter my security for costs in this cause and promise to pay all costs which may accrue to the opposite party in this action or to any of the officers of this court, and in default of payment by the

plaintiffs of any costs ordered or adjudged to be paid by them hereby agree and stipulate that execution may issue against my property for any costs taxed against them.

Dated this eighteenth day of October, A. D. 1882.

E. WALKER.

Endorsed: Filed Oct. 18, A. D. 1882. W. H. Bradley, clerk.

3 UNITED STATES OF AMERICA, *Northern District of Illinois,* } ss:

Circuit Court of — United States, Northern District of Illinois. In Chancery.

CHICAGO & PACIFIC RAILROAD COMPANY and Chicago, Milwaukee & St. Paul Railway Company
vs.
THIRD NATIONAL BANK OF CHICAGO and Huntington W. Jackson, Receiver of Third National Bank of Chicago.
} Bill for Injunction.

To the judge of the circuit court of the United States for the northern district of Illinois, in chancery sitting:

Your orators, The Chicago and Pacific Railroad Company and The Chicago, Milwaukee and St. Paul Railway Company, each of them corporations created by and existing under the laws of the State of Illinois, humbly complaining, show unto your honor that your orator, The Chicago and Pacific Railroad Company, is a body politic and corporate created by a special act of the Legislature of the State of Illinois, passed and approved on the sixteenth day of February, A. D. 1865, with authority to construct and operate a line of railroad from the city of Chicago to the Mississippi river, at a point near Savanna, all lying in the State of Illinois, and commenced the
4 construction of its said line of railroad in the summer or fall of 1872; that for the purpose of procuring means to construct its said road it executed its certain deed of trust, conveying to the trustees therein named all of its property, real and personal, then owned by said company or that might thereafter be acquired, together with the franchises of said company, as security for the payment of a certain issue of bonds authorized by the board of directors of said company and aggregating in amount the sum of three millions of dollars ($3,000,000).

That prior to the month of May, 1876, said company had completed its line of road from the city of Chicago to the town of Byron, in the State of Illinois, a distance of about eighty-nine (89) miles; that in and about the construction of said road said company had created an indebtedness aggregating about the sum of two millions of dollars ($2,000,000), all of which in said month of May, A. D. 1876, was a valid outstanding indebtedness of said company. At said last-named date said company had become greatly embarrassed and was unable to meet its outstanding obligations or to pay the

interest thereon and was in fact insolvent; that on or about the 27th day of May, A. D. 1876, John I. Blair and other holders of said bonds filed in this court their certain bill for the foreclosure of said mortgage, and, upon the petition of the complainant in said bill, one John M. Whitman was appointed receiver of all the property of said company and entered into the possession thereof under
4½ the order of said court; that on the 12th day of February, 1879, by the consideration of said court a decree of foreclosure was entered in said cause, decreeing, among other things, the foreclosure of said mortgage and the sale of said railway property and franchises, which said decree was executed by a sale of said property on the first day of May, 1879, for the sum of nine hundred and sixteen thousand one hundred dollars ($916,100.00), the said John I. Blair and others becoming the purchasers of said property.

Your orators further show that in the months of February and March, 1880, and but a short time before the expiration of the time allowed by the laws of the State of Illinois for the redemption of the said property from said sale under said decree, your orator, The Chicago and Pacific Railroad Company, commenced negotiations with various corporations and parties for the purpose of procuring means for the redemption of its said property; that finally and on or about the first day of April, 1880, it entered into an agreement with your orator, The Chicago, Milwaukee and St. Paul Railway Company, under and by the terms of which said Chicago, Milwaukee and St. Paul Railway Company undertook to advance the necessary amount for the redemption of said property from such sale under said decree; that your orator, The Chicago and Pacific Railroad Company, submitted to the said Chicago, Milwaukee and St.
5 Paul Railway Company a proposition that, in consideration of a lease of said Chicago and Pacific railroad to the said Chicago, Milwaukee and St. Paul Railway Company, said last-named company should advance the necessary sum required for the redemption of said property, amounting at that time in the aggregate to about the sum of one million of dollars ($1,000,000); that a meeting of the stockholders of your orator, The Chicago and Pacific Railroad Company, should be called and the proposition of said lease should be submitted to said stockholders, and, if authorized by said stockholders, then said lease should be executed, together with a new mortgage upon all the property of the Chicago and Pacific Railroad Company securing the payment of bonds to be issued of sufficient amount to meet the cost of redemption and the completion and equipment of said road as authorized by its charter.

Your orators further show that in pursuance of said agreement such meeting of stockholders was duly called and held at the office of your orator, The Chicago and Pacific Railroad Company, in the city of Chicago, on the — day of ——, when certain resolutions were submitted to the stockholders and adopted by a vote of two thousand seven hundred and six (2,706) shares in the affirmative to twenty-five (25) shares in the negative, a copy of which said resolution is hereto attached, marked Exhibit "A," and made a part of this bill.

Your orators further show that on the second day of April,
6 A. D. 1880, your orator, The Chicago and Pacific Railroad Company, by its proper officers, executed with the Chicago, Milwaukee and St. Paul Railway Company the lease authorized by said resolutions, and also a joint trust deed upon all the property of said Chicago and Pacific Railroad Company as security for the payment of a series of bonds, amounting in the aggregate to the sum of three millions of dollars ($3,000,000), to be executed jointly by your orators, all of which were properly executed and placed upon the market for sale, and were, shortly after said first day of April, sold to various parties, and the same are now outstanding as valid liens on all the said property.

Your orators further show that at the time of the execution of said lease the possession of said property was in the said Whitman as such receiver and continued in his possession until his discharge by the order of said court, at which time your orator, The Chicago, Milwaukee and St. Paul Railway Company, entered into the possession of all the property, both real and personal, theretofore owned and held by the said Chicago and Pacific Railroad Company, and has continued in such possession under and by virtue of the terms and covenants of said lease until the present time.

That said lease with the means provided by the execution of said last-named trust deed and bonds and the proceeds of the sale thereof,
by and with the consent of your orator, The Chicago and Pa-
7 cific Railroad Company, has completed the construction of the entire road authorized by its charter from the city of Chicago to the Mississippi river, and has also constructed a bridge across the Mississippi river at or near Savanna.

Your orators further show that since said 2nd day of April, 1880, said railroad has been thoroughly constructed and equipped with necessary cars, rolling stock, and machinery, and that said railroad is now operated and has been continuously for more than one year last passed as an entirety and forms part of your orators' line of railroad between the city of Chicago and the city of Omaha, in the State of Nebraska.

Your orators further show unto your honor that on the 19th day of February, 1880, an action was commenced in this court by the defendant herein, as receiver of the Third National Bank of Chicago, against your orator, The Chicago and Pacific Railroad Company, upon four promissory notes issued by said Chicago and Pacific Railroad Company to the said Third National Bank of Chicago.

That on the 3rd day of April, 1882, upon the hearing of said cause, said court found the issues in favor of the plaintiff, and thereupon entered judgment against said Chicago and Pacific Railroad Company for the sum of thirty-six thousand one hundred and sixty-
five dollars and 36 cents ($36,165.36), and that said defendant
8 caused writ of fieri facias to be issued on said judgment on the — day of October instant and delivered the same to the marshal of said district for execution.

Your orators further respectfully show unto your honor that the

said defendant, the said Huntington W. Jackson, has wrongfully and unlawfully directed and caused A. M. Jones, United States marshal for said district, to levy said writ upon all the real property of your orator, the said Chicago and Pacific Railroad Company, situate in the counties of Cook, Du Page, Kane, De Kalb, Ogle, and Carroll, in said State of Illinois—that is to say, all and singular the railroad of the Chicago and Pacific Railroad Company as the same is now surveyed, laid out, constructed, and located in the counties of Cook, Du Page, Kane, De Kalb, Ogle, and Carroll, in the State of Illinois, including the road-bed, stations or station-houses, depot grounds, rails, ties, fences, and structures of said company, and has given public notice that the said Jones, as United States marshal for the northern district of Illinois, will, on the 24th day of October, A. D. 1882, at two o'clock p. m. of said day, at the south door of the United States custom-house, in the city of Chicago, State and northern district of Illinois, offer said property for sale at public vendue to the highest and best bidder for cash, a copy of which notice is hereto attached, marked Exhibit "B."

9 Your orators admit that the legal title of all of said property so levied upon by the marshal is vested in your orator, The Chicago and Pacific Railroad Company, and that the possession of the same is and has been since the — day of April, A. D. 1880, in your orator, The Chicago, Milwaukee and St. Paul Railway Company, under said lease, and that said road has been continuously operated as a public railroad under the laws and statutes of the State of Illinois.

Your orators further represent that the said marshal did not, prior to said levy or at any other time, notify your orator, the said Chicago and Pacific Railroad Company, that he held said writ, nor did he demand of said company or of either of your orators the payment of said writ, nor did he demand that said orators or either of them should designate any property upon which said writ might be levied, as he was by law required to do.

Your orators further represent unto your honor that the said Chicago and Pacific Railroad Company is lawfully incorporated under the laws of the State of Illinois, and is vested with the franchise not only to construct and operate said road as a public highway or thoroughfare, but also is authorized to charge reasonable fare, freights, and tolls for all business transacted for the public by said company upon said line of road.

10 Your orators further represent that they are advised *by* and verily believe that said writ of *fieri facias* could not be legally levied upon the property and franchise of your orator, The Chicago and Pacific Railroad Company, nor can the said property and franchises be lawfully sold under said writ and in pursuance of said notice, nor can the property described in said notice be lawfully levied upon or sold by the said marshal under said writ separate and apart from the franchises of said corporation.

Your orators further represent that said levy by said marshal is wholly unauthorized by law, and that if he is permitted to sell said

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Your orators further show that at the time of the execution of said lease the possession of said property was in the said Whitman as such receiver and continued in his possession until his discharge by the order of said court, at which time your orator, The Chicago, Milwaukee and St. Paul Railway Company, entered into the possession of all the property, both real and personal, theretofore owned and held by the said Chicago and Pacific Railroad Company, and has continued in such possession under and by virtue of the terms and covenants of said lease until the present time.

That said lease with the means provided by the execution of said last-named trust deed and bonds and the proceeds of the sale thereof,
by and with the consent of your orator, The Chicago and Pa-
7 cific Railroad Company, has completed the construction of the entire road authorized by its charter from the city of Chicago to the Mississippi river, and has also constructed a bridge across the Mississippi river at or near Savanna.

Your orators further show that since said 2nd day of April, 1880, said railroad has been thoroughly constructed and equipped with necessary cars, rolling stock, and machinery, and that said railroad is now operated and has been continuously for more than one year last passed as an entirety and forms part of your orators' line of railroad between the city of Chicago and the city of Omaha, in the State of Nebraska.

Your orators further show unto your honor that on the 19th day of February, 1880, an action was commenced in this court by the defendant herein, as receiver of the Third National Bank of Chicago, against your orator, The Chicago and Pacific Railroad Company, upon four promissory notes issued by said Chicago and Pacific Railroad Company to the said Third National Bank of Chicago.

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Your orators further represent that the said marshal did not, prior to said levy or at any other time, notify your orator, the said Chicago and Pacific Railroad Company, that he held said writ, nor did he demand of said company or of either of your orators the payment of said writ, nor did he demand that said orators or either of them should designate any property upon which said writ might be levied, as he was by law required to do.

Your orators further represent unto your honor that the said Chicago and Pacific Railroad Company is lawfully incorporated under the laws of the State of Illinois, and is vested with the franchise not only to construct and operate said road as a public highway or thoroughfare, but also is authorized to charge reasonable fare, freights, and tolls for all business transacted for the public by said company upon said line of road.

10 Your orators further represent that they are advised *by* and verily believe that said writ of *fieri facias* could not be legally levied upon the property and franchise of your orator, The Chicago and Pacific Railroad Company, nor can the said property and franchises be lawfully sold under said writ and in pursuance of said notice, nor can the property described in said notice be lawfully levied upon or sold by the said marshal under said writ separate and apart from the franchises of said corporation.

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That on the 3rd day of April, 1882, upon the hearing of said cause, said court found the issues in favor of the plaintiff, and thereupon entered judgment against said Chicago and Pacific Railroad Company for the sum of thirty-six thousand one hundred and sixty-five dollars and 36 cents ($36,165.36), and that said defendant
8 caused writ of fieri facias to be issued on said judgment on the — day of October instant and delivered the same to the marshal of said district for execution.

Your orators further respectfully show unto your honor that the

said defendant, the said Huntington W. Jackson, has wrongfully and unlawfully directed and caused A. M. Jones, United States marshal for said district, to levy said writ upon all the real property of your orator, the said Chicago and Pacific Railroad Company, situate in the counties of Cook, Du Page, Kane, De Kalb, Ogle, and Carroll, in said State of Illinois—that is to say, all and singular the railroad of the Chicago and Pacific Railroad Company as the same is now surveyed, laid out, constructed, and located in the counties of Cook, Du Page, Kane, De Kalb, Ogle, and Carroll, in the State of Illinois, including the road-bed, stations or station-houses, depot grounds, rails, ties, fences, and structures of said company, and has given public notice that the said Jones, as United States marshal for the northern district of Illinois, will, on the 24th day of October, A. D. 1882, at two o'clock p. m. of said day, at the south door of the United States custom-house, in the city of Chicago, State and northern district of Illinois, offer said property for sale at public vendue to the highest and best bidder for cash, a copy of which notice is hereto attached, marked Exhibit "B."

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Your orators further represent that the said marshal did not, prior to said levy or at any other time, notify your orator, the said Chicago and Pacific Railroad Company, that he held said writ, nor did he demand of said company or of either of your orators the payment of said writ, nor did he demand that said orators or either of them should designate any property upon which said writ might be levied, as he was by law required to do.

Your orators further represent unto your honor that the said Chicago and Pacific Railroad Company is lawfully incorporated under the laws of the State of Illinois, and is vested with the franchise not only to construct and operate said road as a public highway or thoroughfare, but also is authorized to charge reasonable fare, freights, and tolls for all business transacted for the public by said company upon said line of road.

10 Your orators further represent that they are advised *by* and verily believe that said writ of *fieri facias* could not be legally levied upon the property and franchise of your orator, The Chicago and Pacific Railroad Company, nor can the said property and franchises be lawfully sold under said writ and in pursuance of said notice, nor can the property described in said notice be lawfully levied upon or sold by the said marshal under said writ separate and apart from the franchises of said corporation.

Your orators further represent that said levy by said marshal is wholly unauthorized by law, and that if he is permitted to sell said

property under said levy and in pursuance of said notice it will work an irreparable injury to your said orators.

To the end, therefore, that the said Huntington W. Jackson, receiver, and the Third National Bank of Chicago may be made parties defendant hereto, and that they may be required to answer this bill of complaint, but not under oath, answer under oath being hereby expressly waived, and that the said defendants, their counsellors, attorneys, solicitors, officers, or agents, may be perpetually restrained by an injunction issuing out of this court from further proceeding under said writ of *fieri facias*, and that the said marshal may be restrained from selling under said levy of said writ, on the said 24th day of October, A. D. 1882, or at any other time, or from interfering with the rights, property, or franchises of your orators in any way whatsoever, and that the levy under said
11 writ may be released and all action taken thereunder shall be null and void, and that your orators may have such other or further relief in the premises as the nature of the circumstances of the case may require and to your honor shall seem meet—

Your orators pray for a subpœna in chancery, according to the practice of this court, and your orators also pray for a temporary or preliminary injunction restraining the said Huntington W. Jackson, receiver, The Third National Bank of Chicago, their counsellors, attorneys, solicitors, officers, or agents, from further proceeding under said writ of *fieri facias*, and also the said marshal from selling under said levy of said writ on the said 24th day of October, A. D. 1882, or at any other time, or from interfering with the rights, property, or franchises of your orators in any way whatsoever until the further order of this court; and your orators will ever pray, &c.

E. WALKER,
Solicitor for Compiainants.

WALKER & CARTER, *Of Counsel.*

12 UNITED STATES OF AMERICA, }
Northern District of Illinois, County of Cook, } *ss:*

Edwin Walker, being duly sworn, says that he is president of the defendant, The Chicago and Pacific Railroad Company, and solicitor of the Chicago, Milwaukee and St. Paul Railway Company; that he has read the above bill of complaint, and that the same is true of his own knowledge, except as to such matters as are therein stated to be upon information and belief, and as to them he believes them to be true.

EDWIN WALKER.

Subscribed and sworn to before me this 18th day of October, A. D. 1882.

[SEAL.] FRANK E. GRANGER,
Notary Public.

13 EXHIBIT "A."

Whereas the Chicago & Pacific Railroad Company in the construction of its said railway and partially equipping the same and

procuring the right of way thereto incurred debts to divers persons, amounting in the aggregate to upwards of two million dollars, which said debts or the greater portion thereof are now outstanding and unpaid and are past due, and the said party of the first part is unable to pay and satisfy the same; and

Whereas the said company, for the purpose of raising money to pay said indebtedness and to construct said railway, did, on or about the first day of October, A. D. 1872, make and execute, under the seal of said company, its negotiable bonds, in sums of one thousand dollars each, to the amount in all of three millions of dollars, and did at the same time make and execute a mortgage deed of trust of its said railway, together with all and singular its property of every description, to the New York State Loan and Trust Company of the City of New York, as trustee, in the usual form of mortgage deeds of trust made by railway companies to secure said bonds, and caused the same to be duly recorded in the several counties through which said railway was constructed or to be constructed, so as to make the same a lien thereon; and

14 Whereas said bonds were afterwards, to the amount of two million dollars, pledged and hypothecated by said company to divers persons as security of a portion of the notes given for the aforesaid indebtedness of said company and for the purchase of iron and other materials for the construction of said road, and loans of money as collateral security for said indebtedness, which said parties have caused the said mortgage deed of trust to be foreclosed by a suit in chancery, instituted by John I. Blair *et al.* for the benefit of all parties so holding said bonds in the circuit — of the United States for the northern district of Illinois, in which court a decree was entered on the 12th day of February, A. D. 1879, fixing the amount due said several holders of said bonds and directing that said railway should be sold under and in pursuance of said decree by one of the masters of said court, in pursuance of the rules and practice thereof, subject to the right of redemption by said party of the first part for one year from and after the date of said sale; and

Whereas afterwards, to wit, on the first day of May, in the year of our Lord one thousand eight hundred and seventy-nine, Henry W. Bishop, one of the masters of said court, charged with the execution of said decree, did, in pursuance of public notice theretofore given, in the city of Chicago, sell at public auction the said

15 railway, together with all its franchises, appurtenances, and property contained in said mortgage, in pursuance of said decree, and the same was purchased at said sale by John I. Blair, Edward P. Hatfield, Junior, and William Bayard Cutting for the sum of nine hundred and sixteen thousand one hundred dollars; and

Whereas certain other parties to whom the said company was so as aforesaid indebted have prosecuted their several demands in the superior and circuit courts of Cook county and other courts of the State of Illinois, and have procured divers judgments thereon which now remain unpaid and unsatisfied of record and are a lien upon the

property of the said party of the first part, and other of said demands still remain unliquidated; and

Whereas the Chicago, Milwaukee & St. Paul Railway Company, at the request of this company, now proposes to aid the party of the first part in procuring a sufficient sum of money to redeem said property from the aforesaid sale, and to protect said property from all the aforesaid valid judgment liens, and also to extend and construct the road of this company to the Mississippi river; also to secure all proper and necessary terminal facilities and depots and grounds along the line; also to relay that part of the road already constructed with steel rails, and to fully equip said road with
16 all necessary rolling stock, so as to make the entire line a first-class railroad in all respects, the entire or aggregate cost of which is estimated at three millions of dollars, for which said sum the said company, by their proper officers, propose to execute their joint and several bonds of one thousand dollars each, bearing date the second day of April, A. D. 1880, and becoming due and payable on the 1st day of January, A. D. 1910, bearing interest at six per cent. per annum, payable semi-annually, viz., on the first days of January and July of each year, at the office or agency of the party of the second part, in the city of New York, which said bonds are to be secured by a trust deed or mortgage of even date with said bonds of all the railroad franchises and other property of the party of the first part to the Farmers' Loan and Trust Company of the city of New York; and

Whereas the said Chicago, Milwaukee and St. Paul Railway Company proposes to take up, pay, cancel, and satisfy all of said bonds at their maturity, and to meet, pay, and satisfy all the accruing interest on said bonds as the same shall become due and payable according to the tenor thereof and forever save this company harmless therefrom; and also to pay all taxes, charges, or assessments imposed or assessed or which may be thereafter imposed or assessed upon the property or premises of the Chicago and Pacific Railroad Company; and

17 Whereas the said Chicago and Pacific Railroad Company has no means or resources out of which the necessary amount of money can be realized or provided for the redemption of its property and franchises from said sale under said decree, and for the discharge of said judgment liens and completion of its said railroad, as hereinbefore recited, and no pecuniary credit or ability to provide for the same, except by the aforesaid lease to the said Chicago, Milwaukee and St. Paul Railway Company, and the execution of said mortgage or trust deed, together with the bonds to be secured thereby, as hereinbefore recited:

Now, therefore, be it resolved, That the Chicago & Pacific Railroad Company, in consideration of the premises, shall grant, devise, and lease unto the Chicago, Milwaukee & St. Paul Railway Company all and singular the railroad now owned by this company, and commonly known as the Chicago & Pacific railroad, extending from a point near Chicago avenue, in the city of Chicago, in a westerly direction, by the way of Elgin and Byron, to a junction with the Ra-

cine and Southwestern Division of the Chicago, Milwaukee & St. Paul railway, at Freeport; also at or near Lanark, and from thence to the Mississippi river, including in the premises hereby demised all the railroads, railways, ways, and rights of way, and all the depot grounds and other lands, and all the tracks, bridges, viaducts, culverts,
18 fences, and other structures, and all the depots, station-houses, engine-houses, freight-houses, wood-houses, and other buildings, and all the machine shops and other shops appertaining to the said Chicago & Pacific railroad and now owned by the said company, and including also all locomotives, tenders, passenger, baggage, freight, and other cars, and all other rolling stock and equipments belonging to the said company, and also all tools and machinery, boats and transfer equipment supplies, and property of every name and nature belonging to said company from the — day of ——, A. D. 1880, for and during the full term of nine hundred and ninety-nine years thence next ensuing, and fully to be completed and ended, with proper covenants on the part of said Chicago, Milwaukee & St. Paul Railroad Company to keep and hold said Chicago & Pacific Company free and harmless from all loss and damage on account of the bonds and mortgage hereinbefore referred to and from all taxes or assessments that may be levied upon or assessed against said property during the continuance of said lease, and for the preservation and restoration of said property.

And be it further resolved, That if said Chicago, Milwaukee & St. Paul Railroad Company shall accept said lease and duly execute the same that this company will execute with the said Chicago, Milwaukee & St. Paul Railroad Company the joint and sev-
19 eral bonds of said company to the amount of three millions of dollars, payable thirty years from the date thereof, with six per cent. interest, payable semi-annually; and, for the purpose of securing the payment of said bonds, will join said Chicago, Milwaukee & St. Paul Railway Company in a mortgage of all the property hereby authorized to be leased to the Farmers' Loan and Trust Company of New York, as trustee, in the usual form and with the usual covenants of railway mortgages.

And be it further resolved, That the president and secretary of this company be, and they are hereby, authorized to execute, for and in the name of this company, the lease, bonds, and mortgage hereinbefore recited, and deliver the same for the purposes aforesaid.

EXHIBIT "B."

Marshal's Sale No. 271.

Public notice is hereby given that, by virtue of a writ of *fieri facias* issued out of the circuit court of the United States for the northern district of Illinois, on a judgment rendered in said court April 3rd, A. D. 1882, in favor of the Third National Bank of Chicago, plaintiff, and against The Chicago & Pacific Railroad Company, defendant, I have this day levied upon the following-described property, to wit: All and singular the railroad of the Chicago & Pacific Rail-

road Company as the same is now surveyed, layed out, con-
20 structed, and located in the counties of Cook, Du Page, Kane, De Kalb, Ogle, and Carroll, in the State of Illinois, including the road-bed, stations, or station-houses, depot grounds, rails, ties, fences, bridges, viaducts, and culverts, and all other buildings and structures, as well as engine-houses, machine and other shops used in connection with said railway, all being in the State and northern district of Illinois, and as being the property of said defendant, and that I will offer said real estate for sale at public vendue, to the highest and best bidder for cash, on the 24th day of October, A. D. 1882, at 2 o'clock p. m. of said day, at the south door of the United States custom-house, in the city of Chicago, State and northern district of Illinois.

Dated Sept. 25th, 1882.

A. M. JONES,
United States Marshal, Northern District of Illinois,
By S. C. HAYES, *Deputy.*

Endorsed: Filed Oct. 18th, 1882. Wm. H. Bradley, clerk.

21 On the same day, to wit, on the eighteenth day of October, 1882, there issued out of said clerk's office a writ of subpœna in said entitled cause; which said writ, together with the return of the marshal endorsed thereon, is in the words and figures following, to wit:

Subpœna.

UNITED STATES OF AMERICA, } *ss:*
Northern District of Illinois, }

The United States of America to Third National Bank of Chicago and Huntington W. Jackson, receiver of Third National Bank of Chicago, Greeting:

We command you and every of you that you appear before our judges of our circuit court of the United States of America for the northern district of Illinois, at Chicago, in said district, on the first Monday in the month of December next, to answer the bill of complaint of Chicago and Pacific Railroad Company and Chicago, Milwaukee & St. Paul Railway Company, this day filed in the clerk's office of said court, in said city of Chicago, then and there to receive and abide by such judgment and decree as shall then or thereafter be made, upon pain of judgment being pronounced against you by default.

To the marshal of the northern district of Illinois to execute.

Witness the Hon. Morrison R. Waite, Chief Justice of
[SEAL.] the Supreme Court of the United States of America, at Chicago aforesaid, this 18th day of October, in the year of
22 our Lord, one thousand eight hundred and eighty-two, and of our Independence the 107th.

W. H. BRADLEY, *Clerk.*

Memorandum.

The above-named defendants are notified that unless they and each of them shall enter their appearance in the clerk's office of said court, at Chicago aforesaid, on or before the day to which the above writ is returnable the complainants' bill will be taken against them as confessed and a decree entered accordingly.

W. H. BRADLEY, *Clerk.*

I did not serve Third National Bank of Chicago or H. W. Jackson, receiver, the defendants, having been unable to find either of them or that they had any residence within my district.

A. M. JONES,
U. S. Marshal,
By R. D. SHERMAN, *Deputy.*

Endorsed: Filed Dec. 28th, A. D. 1882. W. H. Bradley, clerk.

23 Afterwards, to wit, on the twenty-third day of October, 1882, came Huntington W. Jackson and filed in said clerk's office his affidavit in said entitled cause; which said affidavit is in the words and figures following, to wit:

Affidavit.

UNITED STATES OF AMERICA, } *ss:*
Northern District of Illinois, }

In the United States Circuit Court for the Northern District of Illinois.

THE CHICAGO & PACIFIC RAILROAD CO. and THE CHICAGO, MILWAUKEE & ST. PAUL RAILWAY CO.
vs.
THE THIRD NATIONAL BANK OF CHICAGO and HUNTINGTON W. JACKSON, Receiver of the Third National Bank of Chicago.

Huntington W. Jackson, being first duly sworn according to law, deposes and says that he was appointed receiver of the said Third National Bank of Chicago on November 24th, 1877, by the Hon. John J. Knox, Com-troller of the Currency, and has ever since continued to act as such receiver to the present time; that on the 19th day of February, 1880, the Third National Bank brought suit against the Chicago & Pacific Railroad Company, on the law side of said United States circuit court, upon certain promissory notes described in the declaration filed in said case; that upon the third day of April, 1882, judgment was rendered in favor of said
24 Third National Bank against said Chicago & Pacific Railroad Company, and execution was issued upon said judgment on the 15th day of July, 1882, and delivered to A. M. Jones, the United States marshal for the northern district of Illinois, for execution upon the 15th day of July, A. D. 1882, all of which will more fully appear upon reference to the records and files of said court.

Deponent further states that upon the 9th day of March, A. D. 1876, prior to the appointment of John M. Whitman as receiver in the foreclosure proceedings mentioned in the bill of complaint herein, judgment was rendered in said circuit court of the United States for the northern district of Illinois for the sum of $3,499.73 damages and $27.05 costs of suit, in the case wherein Horace Tabor was complainant and Thomas M. Dobbins, George S. Bowen, John S. Wilcox, and The Chicago & Pacific Railroad Company were defendants, and that execution was issued upon said judgment on the 9th day of September, A. D. 1876, and that subsequent thereto an *alias* execution was issued April 8th, A. D. 1879, and received by the U. S. marshal for said district April 8th, 1879, and also a *pluries* execution was issued May 4th, 1880, and was received by the marshal May, 4th 1880, at 11 o'clock in the morning, on which was endorsed the following: "By virtue of the annexed writ I have, on the 2nd day of July, A. D. 1880, levied upon all the right, title, and interest of the within defendants in and to all and singular the
25 railroad of the said Chicago & Pacific Railroad Company as the same is now surveyed, laid out, and constructed, from the said Chicago avenue, in the city of Chicago, to the town of Byron, in Ogle county, State of Illinois, in said State of Illinois, the distance of 88 miles, including the road, road-bed, station-, station-houses, depots, rails, ties, fences, bridges, viaducts, culverts, and other buildings and structures, as well as engine-houses, machine and other shops, used in connection with said railway. Signed Jesse L. Hildrup, by L. O. Gilman, deputy."

There is also endorsed on said writ the following, to wit: "On the 2nd day of October, A. D. 1880, after having advertised the balance of the property lying and being in the county of Cook, State of Illinois, heretofore levied upon, and by virtue of the within writ I offered the same for sale at public vendue, and O. R. Glover, the assignee in this case, having bid $4,685.61, and he being the highest and best bidder, the property was struck off to him for that amount; and afterwards, to wit, on the 14th day of October, A. D. 1880, on motion of the attorney for the assignee as aforesaid, the court by order of record set the aforesaid sale aside. I therefore, this 15th day of October, A. D. 1880, return this writ wholly unsatisfied. Signed Jesse L. Hildrup, by L. O. Gilman, deputy."

Deponent further says that a *pluries* writ was issued on October 16th, A. D. 1880, upon which was endorsed a levy by the marshal, on the 18th day of October, A. D. 1880, of all the right, title, and
interest of the Chicago & Pacific Railroad Company to all
26 singular the railroad of the said company as the same is now surveyed, laid out, and constructed, extending from Chicago avenue, in the city of Chicago, in the State of Illinois, to the town of Byron, in Ogle county, in said State of Illinois, the distance being 88 miles, including the road, road-bed, station-, station houses, depot grounds, rails, ties, fences, and all other structures, as well as engine-houses and machine shops, used in connection with said railway.

That afterwards, on the 2nd day of June, A. D. 1881, by order

of the plaintiffs' attorney, the levy was released by the United States marshal and the writ returned wholly unsatisfied.

That afterwards, on the 2nd day of June, A. D. 1881, a *pluries* writ of execution was issued, upon which was endorsed the following:

"By virtue of the annexed writ I have, this 2nd day of June, A. D. 1881, levied upon all the right, title, and interest of the within-named defendants or either of them in and to the following-described property, to wit: All and singular the railroad of the said Chicago & Pacific Railroad Company as the same is now laid out, constructed, and located in the counties of Cook, Du Page, Kane, Ogle, De Kalb, and Carroll, in the State of Illinois, including the road, road-bed, station-, station-houses, depot grounds, rails, ties. fences, bridges, viaducts, and culverts, and all other buildings and structures, as well as the engine-houses and machine shops, used in connection with said railway, all being in the State of Illi-
27 nois. Signed A. M. Jones, by L. O. Gilman, deputy."

Also endorsed on the writ was the following:

On the 25th day of June, A. D. 1881, after having advertised the above-described property according to statute in such case made and provided, I offered the same for sale at public vendue, and Albert Keep, having bid the sum of $4,822.00 when so offered, the same was struck off to him for that amount, and I therefore return this writ wholly satisfied this 28th day of June, A. D. 1881. Signed, A. M. Jones, L. O. Gilman, deputy; which said execution and the endorsements thereon will more fully appear by reference to the records and files of said U. S. cir. court.

The certificate of sale from the United States marshal to Albert Keep was filed in the recorder's office of Cook county, Ill., in Book 1051, page 282, as will appear by a reference to the records of said county.

Deponent further states that upon the 25th day of September, A. D. 1882, the Third National Bank of Chicago, a judgment creditor as aforesaid of the Chicago and Pacific Railroad Co., in accordance with the provisions of the statutes of the State of Illinois, by the payment of the sum of $5,304.20, redeemed the land described in the certificate of sale from the United States marshal to Albert Keep from the sale made by said marshal on the 25th day of June, A. D. 1881, by virtue of the *pluries* writ of *fieri facias* issued out of the circuit court of the United States for the said northern district
28 of Illinois, upon the judgment rendered in said court on the 9th day of March, A. D. 1876, in favor of said Horace Tabor *vs.* Thomas M. Dobbins, George S. Bowen, John S. Wilcox, and the Chicago & Pacific Railroad Company, said sum being the amount of the purchase-money paid for said land at said sale, together with interest thereon from the date of said sale at the rate of 8 per cent. per annum, said payment having been made to the U. S. marshal for the northern district of Illinois for the use of the purchaser at said sale, his executors, administrators, or assigns, according to said statutes; that said marshal issued the certificate of redemption to said Third National Bank, which was duly filed in the recorder's

office of Cook county September 25th, A. D. 1882; that said marshal, in compliance with the statutes as therein provided, advertised and offered the premises for sale under said execution, being the same advertisement and sale set forth and referred to in the bill of complaint filed herein.

Deponent further states that on the 24th day of June, A. D. 1882, the said Albert Keep, for and in consideration of the sum of $5,207.76, assigned and transferred the certificate of sale issued to him by the said United States marshal on the 25th day of June, A. D. 1881, to Alexander Mitchell, of Milwaukee, in the State of Wisconsin; that the said Alexander Mitchell, by E. Walker, his attorney, has since the redemption from said sale by the said Third National Bank, given his written receipt to A. M. Jones,
29 United States marshal, for the said $5,304.20, being the amount paid by the Third National Bank for the redemption as aforesaid, in the said case of Horace Tabor *vs.* Thomas M. Robbins, George S. Bowen, John S. Wilcox, and the Chicago & Pacific Railroad Company.

Deponent further states that the said Alexander Mitchell is president of the complainant, The Chicago, Milwaukee & St. Paul Railway Company, and that the said E. Walker is president of the Chicago & Pacific Railroad Company.

Deponent further states that the Chicago and Pacific Railroad Company, on or about the ninth day of April, A. D. 1880, by the payment of one miilion two thousand three hundred sixty-nine & $\frac{16}{100}$ dollars, redeemed from the sale made under the foreclosure proceedings against said Chicago and Pacific Railroad Company to John I. Blair and others, which said sale is mentioned in the bill of complaint filed herein, & that John M. Whitman, receiver of said Chicago and Pacific Railroad Company, was discharged as said receiver June 28th, 1880; all of which will more fully appear upon reference to the records of this case.

Deponent further states that previous to the redemption by the said Third National Bank as aforesaid he was informed that Mr. Edwin Walker, one of the solicitors to the bill filed herein, had notified either the said Albert Keep or some one acting for the said Keep that the Chicago and Pacific R. R. Co. would redeem
30 from the sale as aforesaid to the said Keep, and that therefore the said Keep had decided not to require the formality of a redemption, but to assign the certificate of sale, and which, as deponent understood, was assigned either to the Chicago and Pacific Railroad Company or to some one in its behalf.

HUNTINGTON W. JACKSON.

UNITED STATES OF AMERICA, *Northern District of Illinois,* } *ss:*

Huntington W. Jackson, being first duly sworn, deposes and says that he has read the foregoing affidavit by him subscribed, and that the same is true to the best of his knowledge, information, and belief.

HUNTINGTON W. JACKSON.

Subscribed & sworn to before me this 23d day of October, 1882.
[SEAL.] WILLIAM A. HAMILTON,
Notary Public.

Endorsed: Filed Oct. 23, 1882. W. H. Bradley, clerk.

31 On the same day, to wit, on the twenty-third day of October, in the adjourned October term of said court, 1882, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

Order.

THE CHICAGO AND PACIFIC RAILROAD COMPANY and The Chicago, Milwaukee, and St. Paul Railway Company
vs.
THE THIRD NATIONAL BANK OF CHICAGO and HUNTINGTON W. JACKSON, Receiver of said Bank. } In Chancery.

Now come the complainants, by Edwin Walker, Esq., their solicitor, and come also the defendants, by H. W. Jackson, John H. Thompson, and Judge Lawrence, their solicitors, and the complainants, by their solicitors, move the court for an injunction against the defendant-, as prayed for in the bill herein; and after hearing the arguments of counsel, the court being sufficiently advised in the premises, orders that the defendants, their counselors, attorneys, solicitors, officers, and agents, be, and they are hereby, enjoined and restrained from further proceeding under the writ of *fieri facias* issued out of this court on the fifteenth day of July last upon a judgment recovered in said court on the third day of April last, in favor of said defendant, The Third National Bank of Chicago,
32 and against said complainant, The Chicago and Pacific Railroad Company, until the further order of the court herein, with leave to the defendants to move after the expiration of twenty days to modify or dissolve said injunction.

Afterwards, to wit, on the twenty-third day of November, 1882, came the defendants, by their solicitors, and filed in said clerk's office their appearance in said entitled cause, which said appearance is in the words and figures following, to wit:

Appearance.

UNITED STATES OF AMERICA, *Northern District of Illinois*, } *ss:*

U. S. Circuit Court, to the Dec. Term, A. D. 1882.

THE CHICAGO AND PACIFIC RAILROAD COMPANY *et al.*, Complainants,
vs.
THE THIRD NATIONAL BANK *et al.*, Defendants.

We hereby enter our appearance as solicitors for defendants in above-entitled case.
Oct. 31st, 1882.

LYMAN & JACKSON &
JOHN H. THOMPSON,
Sol'rs for Def'ts.

Endorsed: Filed Nov. 23d, 1882. Wm. H. Bradley, clerk.

33 Afterwards, to wit, on the twenty-seventh day of November, in the adjourned October term of said court, 1882, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

Order.

CHICAGO AND PACIFIC RAILROAD COMPANY *et al.*
vs.
THIRD NATIONAL BANK OF CHICAGO *et al.* } In Chancery.

On motion of H. W. Jackson, defendants' solicitor, the time for the defendant- to answer herein is hereby extended thirty days.

Afterwards, to wit, on the eleventh day of December, in the adjourned October term of said court, 1882, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

Order.

THE CHICAGO AND PACIFIC RAILROAD COMPANY *et al.*
vs.
THE THIRD NATIONAL BANK OF CHICAGO. } In Chancery.

Now come the parties, by their solicitors, and the motion of the defendants to dissolve the injunction heretofore issued herein
34 now being heard, the court, not being sufficiently advised in the premises, takes time to consider.

Afterwards, to wit, on the fifteenth day of January, 1883, came the defendants, by their solicitors, and filed in said clerk's office their answer to the bill in said entitled cause; which said answer is in the words and figures following, to wit:

35 UNITED STATES OF AMERICA, } ss:
Northern District of Illinois, }

In the Circuit Court of the United States for the Northern District of Illinois, to the December Term, A. D. 1882.

THIRD NATIONAL BANK OF CHICAGO and HUNTINGTON W. JACKSON, as Receiver of The Third National Bank of Chicago, Defendants,
ads.
THE CHICAGO & PACIFIC RAILROAD COMPANY and THE CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Complainants.

The joint and several answer of The Third National Bank of Chicago and Huntington W. Jackson, receiver of The Third National Bank of Chicago, defendants, to the bill of complaint of The Chicago and Pacific Railroad Company and The Chicago, Milwaukee & St. Paul Railway Company.

These defendants, now and at all times saving and reserving unto themselves all benefit and all manner of exception to the many errors and imperfections in said bill of complaint contained, for answer thereto, or to so much thereof as they are advised it is material and necessary for them to make answer unto, answering, say—

That they admit that the Chicago and Pacific Railroad Com-
36 pany executed its certain deed of trust, as set forth in said bill of complaint; which said deed of trust was foreclosed in this court, and that John I. Blair and others, under the decree entered therein, became the purchasers of the property described in said decree.

These defendants, further answering, say that they have no knowledge, save by complainants' bill, whether the Chicago and Pacific Railroad Company entered into an agreement with the Chicago, Milwaukee & St. Paul Railway Company by which the Chicago, Milwaukee & St. Paul Railway Company undertook to advance the necessary amount for the redemption of the property from the sale under said decree of foreclosure in said court.

These defendants, further answering, say that they have been informed and believe it to be true that the Chicago and Pacific Railroad Company executed a lease of, to the Chicago, Milwaukee & St. Paul Railway Company, and that the Chicago and Pacific Railroad Company and the Chicago, Milwaukee & St. Paul Railway Company executed a joint trust deed upon, all the property of the said Chicago and Pacific Railroad Company as security for the payment of a series of bonds, amounting in the aggregate to the sum of three million dollars, and for greater certainty therein pray leave to refer to the said lease and trust deed when the same shall be produced by the complainants.

And these defendants, further answering, say that they are
37 informed and believe it to be true that the said Chicago and Pacific Railroad Company has been constructed and equipped, and that said road is now operated from the city of Chicago to the

Mississippi river, as authorized by its charter; but these defendants deny that said road has been constructed from the city of Chicago to the city of Omaha, in the State of Nebraska, or that the road, as so constructed from the Mississippi river to the city of Omaha, in the State of Nebraska, forms a part of the road of the said Chicago and Pacific Railroad Company.

And these defendants, further answering, deny that an action was commenced in this court by the defendant, Huntington W. Jackson, as receiver of the Third National Bank, against the Chicago and Pacific Railroad Company, upon four promissory notes issued by said Chicago and Pacific Railroad Company, but aver that such action was commenced by the said Third National Bank of Chicago against the Chicago and Pacific Railroad Company, and that judgment was rendered in this court on the 3rd day of April, A. D. 1882, in favor of said Third National Bank of Chicago against the Chicago and Pacific Railroad Company for the sum of $36,165.36 and $36.20, costs of suit, and that said judgment now remains wholly unsatisfied and in full force.

These defendants, further answering, say that on the 9th
38 day of March, A. D. 1876, judgment was rendered in this court in favor of Horace Tabor against Thomas M. Dobbins, John S. Bowen, George M. Wilcox, and the Chicago and Pacific Railroad Company for the sum of $3,499.73, damages, and $27.05, costs of suit, and that on the 25th day of June, A. D. 1881, by virtue of a writ of *fieri facias* issued in said cause the United States marshal for the northern district of Illinois sold all and singular the road of the Chicago and Pacific Railroad Company as the same is now laid out, constructed, and located in the counties of Cook DuPage, Kane, De Kalb, Ogle, and Carroll, in the State of Illinois, including the road, road-bed, station-, and station-houses, depot grounds, rails, ties, fences, bridges, viaducts, culverts, and all other buildings and structures, as well as engine-houses and machine shops, used in connection with said railroad, all being in said northern district of Illinois, to Albert Keep; that on the 25th day of September, A. D. 1882, the Third National Bank of Chicago, in accordance with the statutes of Illinois, upon the payment of $5,304.20, redeemed from the said sale to Albert Keep, and the United States marshal for the northern district of Illinois proceeded, in accordance with the provisions of the statutes of Illinois where a redemption is made by a judgment creditor, until enjoined by this court
39 from selling this property, and these defendants claim and insist that said judgment in favor of the Third National Bank of Chicago against the Chicago and Pacific Railroad Company is by virtue of said redemption proceedings a valid and subsisting lien upon the said Chicago and Pacific Railroad Company as against the complainants or either of them in this cause, and is prior and superior to any lien or claim which said complainants or either of them may or can assert.

These defendants, further answering, admit that the United States marshal did not, prior to the levy on the premises redeemed as aforesaid, in accordance with the statutes of the State of Illinois, or at

any other time, notify the Chicago and Pacific Railroad Company that he held a writ of *fieri facias* against the said Chicago and Pacific Railroad Company, nor did he demand of the said company or of said Chicago, Milwaukee & St. Paul Railway Company payment of said writ, nor did he demand that said Chicago and Pacific Railroad Company or said Chicago, Milwaukee & St Paul Railway Company should designate any property upon which said writ might be levied, but charge that under the law the said marshal was not required to notify either of said complainants that he had held said writ nor demand payment of either of said complainants, nor demand that either of said complainants should designate any property upon which said writ might be levied.

And these defendants, further answering, say that subsequent to the redemption by said Third National Bank of Chicago and
40 prior to the filing of the bill of complaint herein Alexander Mitchell, to whom the certificate of sale issued by the United States marshal to Albert Keep had been assigned, accepted and receipted, by his attorney, E. Walker, to the United States marshal for the redemption money so paid by the Third National Bank of Chicago, and that said Alexander Mitchell is president of the said Chicago, Milwaukee & St. Paul Railway Company, and that said E. Walker is president of the Chicago and Pacific Railroad Company; and these defendants charge, upon information and belief, that the said Alexander Mitchell, in taking the assignment of said certificate of sale to said Keep and receipting for and accepting said redemption money, did so in the interest of and with the knowledge and consent of the said Chicago and Pacific Railroad Company.

These defendants, further answering, deny that the complainants or either of them are entitled to the relief or any part thereof in said bill of complaint demanded, and pray to be dismissed with reasonable costs and charges.

THIRD NATIONAL BANK OF CHICAGO,
By LYMAN & JACKSON, *Its Solicitors.*

LYMAN & JACKSON,
JNO. H. THOMPSON,
C. B. LAWRENCE, *Sol'rs.*

Endorsed: Filed Jan. 15th, 1883. Wm. H. Bradley, clerk.

41 On the same day, to wit, on the fifteenth day of January, 1883, in the December term of said court, 1882, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

Order.

THE CHICAGO AND PACIFIC RAILROAD COMPANY *et al.*
vs.
THE THIRD NATIONAL BANK OF CHICAGO. } In Chancery.

Now come the parties, by their solicitors, and, on motion of Mr.

Jackson, leave is given said bank to file a cross-bill herein, and thereupon the defendants therein are ruled to answer the same in twenty days.

On the same day, to wit, on the fifteenth day of January, 1883, came the Third National Bank of Chicago, by its solicitors, and filed in said clerk's office its cross-bill in said entitled cause; which said cross-bill is in the words and figures following, to wit:

42 UNITED STATES OF AMERICA, *Northern District of Illinois,* } *ss:*

In the Circuit Court of the United States for the Northern District of Illinois, to the December Term, 1882.

THIRD NATIONAL BANK OF CHICAGO, Complainant,
vs.
THE CHICAGO & PACIFIC RAILROAD COMPANY, THE CHICAGO, Milwaukee & St. Paul Railway Company, The Farmers' Loan and Trust Company, Defendants.

To the judges of the circuit court of the United States for the northern district of Illinois, in chancery sitting:

The Third National Bank of Chicago, a corporation created by the laws of the United States, brings this bill of complaint against the Chicago & Pacific Railroad Company, a corporation created by the laws of Illinois, the Chicago, Milwaukee & St. Paul Railway Company, a corporation created by the laws of Illinois, and the Farmers' Loan and Trust Company, a corporation created by the laws of New York; and thereupon your orator complains and says—

That on or about the third of April, A. D. 1882, judgment for $36,165.36 and $36.20, costs of suit, was rendered in this court against the Chicago and Pacific Railroad Company upon certain promissory notes described in the declaration in this case, which said
43 notes were given for money loaned by the said Third National Bank of Chicago to the said Chicago and Pacific Railroad Company; that execution was issued upon said judgment upon the 25th day of July, A. D. 1882, and was delivered to the marshal of said district upon the same day, and that said judgment now remains wholly unsatisfied and in full force, to the records whereof now in this honorable court on the law side thereof, your orator prays leave to refer.

Your orator further shows unto your honors that upon the 9th day of March, A. D. 1876, judgment was rendered in this court for the sum of $3,499.73, damages, and $27.05, costs of suit, in the case wherein Horace Tabor was plaintiff and Thomas M. Dobbins, George S. Bowen, John S. Wilcox, and The Chicago and Pacific Railroad Company were defendants, and that execution issued on said judgment within a year from the rendition of the same.

Your orator further shows that at the time of the rendition of said judgment the Chicago and Pacific Railroad Company owned

and was possessed of the railroad and appurtenances known as the Chicago and Pacific Railroad Company, extending from the city of Chicago, county of Cook, and State of Illinois, to the town of Byron, Ogle county, in said State of Illinois, being a distance of about 88 miles, upon which railroad and appurtenances your orator is advised said judgment, at its rendition, became and was a lien, and so expressly charges the law and fact to be; that on the 25th day of June, A. D. 1881, by virtue of a writ of *fieri facias* is-

44 sued in said cause, the United States marshal for the northern district of Illinois sold all and singular the railroad of the Chicago and Pacific Railroad Company as the same is now laid out, constructed, and located in the counties of Cook, Du Page, Kane, De Kalb, Ogle, and Carroll, in the State of Illinois, including the road, road-bed, station- or station-houses, depot grounds, rails, ties, fences, bridges, viaducts, and culverts, and all other buildings or structures, as well as engine-houses and machine shops, used in connection with said railroad, all being in said northern district of Illinois, to Albert Keep; that on the 25th day of September, A. D. 1882, the Third National Bank of Chicago, in accordance with the statutes of Illinois, by the payment of $5,304.20 redeemed from said sale to Albert Keep, and the said United States marshal for the northern district of Illinois proceeded in accordance with the provisions of the statutes of Illinois when redemption is made by a judgment creditor, until enjoined by this court from selling the property so redeemed as aforesaid, as by reference to the writ of *fieri facias*, issued as aforesaid upon the 15th day of July, A. D. 1882, and to the redemption proceedings and to the proceedings upon the application for an injunction will more fully appear, and which levy, so made by said United States marshal, your orator is advised, so far as the same had or could have legal force and effect, is still preserved, and remains in full force and unimpaired.

45 Your orator further shows that the certificate of sale issued to the said Albert Keep was assigned by said Albert Keep to Alexander Mitchell, and that subsequent to the redemption by the said Third National Bank of Chicago, and prior to the filing of the bill of complaint by the Chicago and Pacific Railroad Company and the Chicago, Milwaukee and St. Paul Railway Company against your orator and Huntington W. Jackson, receiver of the Third National Bank of Chicago, the said Alexander Mitchell, by his attorney, E. Walker, accepted from and receipted to the United States marshal for the northern district of Illinois for the money so paid by the Third National Bank of Chicago under the redemption proceedings as aforesaid.

Your orator further shows that Alexander Mitchell is president of the Chicago, Milwaukee & St. Paul Railway Company, and that E. Walker is president of the Chicago and Pacific Railroad Company.

Your orator further shows, upon information and belief, that the said Alexander Mitchell, in taking the assignment of the said certificate of sale issued to said Keep and receipting for said redemption money so paid by the said Third National Bank of Chicago,

did so in the interest of and with the knowledge and consent of the Chicago and Pacific Railroad Company.

Your orator further shows that it is informed and believes that subsequent to the rendition of the said judgment in favor of
46 the said Horace Tabor, the Chicago and Pacific Railroad Company executed a lease to the Chicago, Milwaukee & St. Paul Railway Company, and that the Chicago and Pacific Railroad Company and the Chicago, Milwaukee & St. Paul Company executed a joint trust deed upon all the property of the said Chicago and Pacific Railroad Company to The Farmers' Loan and Trust Company of New York as security for the payment of a series of bonds, amounting in the aggregate to the sum of three million dollars, which lease and trust deed, by virtue of the redemption proceedings aforesaid, your orator charges is junior and subsequent to your orator's judgment and lien aforesaid.

Your orator further shows unto your honors that on the 18th day of October, A. D. 1882, the Chicago and Pacific Railroad Company and the Chicago, Milwaukee & St. Paul Railway Company filed in this honorable court their bill of complaint, wherein they alleged, among other things, the rendition of the said judgment in favor of The Third National Bank of Chicago against The Chicago and Pacific Railroad Company, and further allege the levy of the writ of *fieri facias* upon all the real property — by your orator on said Chicago and Pacific Railroad Company, situated in the counties of Cook, Du Page, Kane, De Kalb, Ogle, and Carroll, in the State of Illinois— that is to say, all and singular the road of the Chicago and Pacific Railroad Company as the same is now surveyed, laid out, constructed, and located, in the counties of Cook, Du Page, Kane, De Kalb,
47 Ogle, and Carroll, in the State of Illinois, including the road, road-bed, station-, station-houses, depot grounds, rails, ties, fences, and structures of said company, and further alleging that the property described in said notice could not be lawfully levied upon and sold by the said marshal under said writ separate and apart from the franchises of the Chicago and Pacific Railroad Company, and praying, among other things, that said defendants, its counsellors, attorneys, officers, and agents, may be perpetually restrained, by an injunction issuing out of this honorable court, from further proceeding under said writ of *fieri facias;* that on the 23rd day of October, A. D. 1882, an injunction was granted by this honorable court, in accordance with said prayer, until the further order of the court herein; and your orator further shows that your orator and Huntington W. Jackson, receiver of the Third National Bank, are parties defendant to the said bill of complaint, and that your orator and said Jackson have appeared and made answer thereto, averring and insisting upon the validity of the lien of said judgment rendered in favor of your orator as aforesaid; and your orator is further advised that the judgment aforesaid and the redemption money so paid as aforesaid constitute an equitable lien upon the said Chicago and Pacific Railroad Company; that it has no adequate remedy upon said judgment at law, or for the recovery of the re-

demption money so paid as aforesaid, and can only obtain
48 the fruit thereof by interposition of this honorable court.

Forasmuch, therefore, as your orator is without remedy in the premises except by filing this its cross-bill in the proceedings commenced by the said Chicago and Pacific Railroad Company and the Chicago, Milwaukee & St. Paul Railway Company against your orator and said Huntington W. Jackson, receiver of the Third National Bank of Chicago, to the end, therefore, that the said Chicago and Pacific Railroad Company, The Chicago, Milwaukee, & St. Paul Railway Company, and The Farmers' Loan and Trust Company, which are hereby made parties defendant to this cross-bill, may make and show why your orator should not have the relief hereby prayed, and full, true, and perfect answer make to all and singular the matters and things before made and charged, but not under oath, answer upon oath being hereby expressly waived, but as fully and completely as if hereby specially interrogated; that said judgment of your orator, together with the amount paid as aforesaid for redemption from the sale to Albert Keep, may be decreed to be a valid and subsisting lien created in favor of your orator upon the said Chicago and Pacific Railroad Company, together with all its property, depot grounds, fixtures, and appurtenances, and that this honorable court may decree that the same creates an equitable lien and encumbrance upon the property of the said Chicago and Pacific
Railroad Company, together with its property, depot grounds,
49 fixtures, and appurtenances, and that a receiver of the said
Chicago and Pacific Railroad Company, together with all its property, depot grounds, fixtures, and appurtenances, may be appointed according to the course practiced by your honors, with the usual powers of receivers in like cases; that he may be let into and take possession of said Chicago and Pacific Railroad Company, with all its property, depot grounds, fixtures, and appurtenances, and all the rents, issues, and profits thereof; that he may have power to manage and operate the said road; that he have power to apply the revenues and all the rents, issues, and profits thereof to the payment of your orator's said judgment and the amount of redemption money, interest, and costs thereon paid by it under said sale to Albert Keep; and that the said Chicago and Pacific Railroad Company may be decreed to be sold, with its franchises, property, fixtures, and appurtenances, under the order and direction of this honorable court, and that out of the proceeds thereof your orator may have satisfaction of its said judgment and the amount paid by it for redemption under the sale made as aforesaid to the said Albert Keep; and that your orator may have such further and such other relief in the premises as the nature of the case shall require and as
shall be agreeable to equity and good conscience, and as the
50 court may see fit to give to your orator.

May it also please your honors to grant unto your orator the writ of subpœna, issuing out of and under the seal of this honorable court, to be directed to the Farmers' Loan and Trust Company, commanding it, at a certain day and under a certain penalty therein to be inserted, to be and appear before this honorable court, and then and

there answer the premises, and further to stand to and abide by and perform such order or decree therein as to your honors shall seem agreeable to equity and good conscience.

And your orator will ever pray, &c.

THIRD NATIONAL BANK OF CHICAGO,
By LYMAN & JACKSON, *Its Solicitors.*

LYMAN & JACKSON,
JNO. H. THOMPSON,
C. B. LAWRENCE, *Sol'rs.*

UNITED STATES OF AMERICA, } ss:
Northern District of Illinois, }

Huntington W. Jackson, being duly sworn, states that he is one of the solicitors of The Third National Bank of Chicago, and has read the above bill of complaint, and that the same is true of his own knowledge except as to such matters as are therein stated to be upon information and belief, and as to them he believes them to be true.

HUNTINGTON W. JACKSON.

Subscribed and sworn to before me this 15th day of January, A. D. 1883.

[SEAL.] WILLIAM A. HAMILTON,
Notary Public.

Endorsed: Filed Jan. 15, '83. Wm. H. Bradley, clerk.

51 Afterwards, to wit, on the first day of February, 1883, came the defendants to the cross-bill, by their solicitor, and filed in said clerk's office their demurrer to the cross-bill in said entitled cause; which said demurrer is in the words and figures following, to wit:

Demurrer.

Circuit Court United States, Northern District of Illinois.

THE CHICAGO AND PACIFIC RAILROAD COMPANY and Chicago, Milwaukee and St. Paul Railway Company
vs.
THIRD NATIONAL BANK OF CHICAGO & HUNTINGTON W. JACKSON, Receiver, &c. } Bill.

THIRD NATIONAL BANK OF CHICAGO
vs.
THE CHICAGO AND PACIFIC RAILROAD COMPANY and The Chicago, Milwaukee and St. Paul Railway Company, The Farmers' Loan and Trust Company. } Cross-Bill.

The demurrer of defendants to cross-bill of Third National Bank of Chicago, complainant.

These defendants respectively, by protestation, not confessing or

acknowledging all or any of the matters and things in the said complainant's cross-bill to be true in such manner and form as the same are therein set forth and alleged, do demur thereto, and
52 for cause of demurrer show that the said complainant hath not in and by said cross-bill made or stated such a cause as doth or ought to entitle it to any such discovery or relief as is thereby sought and prayed for from or against these defendants. Wherefore these defendants demand the judgment of this honorable court whether they shall be compelled to make any further answer to the said cross-bill or any of the matters and things therein contained, and pray to be hence dismissed with their reasonable costs in this behalf sustained.

E. WALKER,
Solicitor for Defendants.

STATE OF ILLINOIS, } ss:
County of Cook, }

E. Walker, being duly sworn, upon his oath says that the foregoing demurrer is, in his opinion, well founded in point of law, and that the same is not interposed for the purpose of delay.

E. WALKER.

Subscribed and sworn to before me this 1st day of February, A. D. 1883.

FRANK E. GRANGER.
Notary Public.

Endorsed: Filed Feb. 1, 1883. W. H. Bradley, clerk.

53 Afterwards, to wit, on the fifteenth day of March, in the adjourned March term of said court, 1883, in the record of the proceedings thereof in said entitled cause before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

Order.

THE CHICAGO AND PACIFIC RAILROAD COMPANY *et al.*
vs.
THE THIRD NATIONAL BANK OF CHICAGO. } In Chancery.

The demurrer of the complainants to the cross-bill of the defendant now coming on and being now heard, and the court upon the hearing not being sufficiently advised in the premises takes time to consider.

Afterwards, to wit, on the twenty-sixth day of March, in the adjourned March term of said court, 1883, in the record of the proceedings thereof in said entitled cause before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

Order.

CHICAGO AND PACIFIC RAILROAD COMPANY
vs.
THIRD NATIONAL BANK OF CHICAGO *et al.* } In Chancery.

The court having considered the demurrer of the com-
54 plainant to defendants' cross-bill overrules the same, and leave is hereby given said complainant to answer said cross-bill within thirty days.

Afterwards, to wit, on the twenty-seventh day of April, 1883, came the defendants to the cross-bill, by their solicitor, and filed in said clerk's office their answer to the cross-bill in said entitled cause; which said answer is in the words and figures following, to wit:

55 In the Circuit Court of the United States, Northern District of Illinois.

THIRD NATIONAL BANK OF CHICAGO, Complainant,
vs.
THE CHICAGO AND PACIFIC RAILROAD COMPANY, THE Chicago, Milwaukee & St. Paul Railway Company, *et al.*, Defendants. } Cross-Bill.

The joint and several answer of The Chicago and Pacific Railroad Co. and The Chicago, Milwaukee & St. Paul R'y Co., defendants, to the cross-bill of The Third National Bank.

These defendants, now and at all times, saving and reserving to themselves all benefit and all manner of exceptions to the many errors and imperfections in said cross-bill of complaint contained, for answer thereto, or to so much thereof as they are advised it is necessary or material for them to make answer unto, answering, say—

That they admit that said Third National Bank is a corporation created under the laws of the United States, and that these defendants are corporations legally organized under the laws of the State of Illinois.

The said defendants admit the recovery of said judgment for $36,165.36 against the defendant, The Chicago & Pacific Railroad Co., as in said cross-bill charged, and that the same is unpaid and in full force.

Said defendants also admit the recovery of a judgment
56 on the 9th day of March, 1876, by Horace Tabor against the defendant, The Chicago & Pacific Railroad Co., for $3,497.73, as in said cross-bill charged.

The said defendants, further answering, say that prior to the entry of said last-named judgment the said Chicago & Pacific Railroad Company, under its charter, authorized the construction of a railroad from the city of Chicago to the town of Savanna, on the

Mississippi river, a distance of about one hundred and fifty miles, had partially constructed about eighty-eight miles of said line of road, and had partially equipped the same; that for the purpose of providing and procuring means for the construction and equipment of its said road said company duly executed a mortgage of all its property and franchises to secure the payment of its bonds to the amount of two million dollars, with interest thereon, payable semi-annually.

That on or about the 1st day of April, 1875, said company defaulted in the payment of its interest then maturing on said bonds (all having been issued by said company and then outstanding), and said default continuing, the holders thereof, on the — day of ——, 1876, filed in this court their certain bill of foreclosure of said mortgage.

That on the 27th day of May, 1876, this court, by its decree entered in said cause, appointed a receiver of all the railroad,
57 property, and effects of the said Chicago & Pacific Railroad Company, with the usual powers of receivers, and that said receiver, under the orders and decrees of said court, took possession, control, and charge of all said property, and so continued until about the 1st day of June, 1880, when the said receiver, after a sale of all of said property under a final decree entered in said foreclosure cause, was discharged from his said trust.

And the said defendants, further answering, say that if the said Tabor judgment became a lien upon the property of the said Chicago & Pacific Railroad Co., as charged in said cross-bill, said lien was subordinate to the lien of said mortgage and bonds and of other judgment liens that were at said date paramount to lien of said judgment, which said prior liens greatly exceeded the full value of all the said property and franchises of said Chicago & Pacific Railroad Co.

And the said defendants further say that said Chicago & Pacific Railroad Co. at the date of said judgment had no property subject to execution; that it was then and ever since has been and is now insolvent.

The said defendants, further answering, say that the final decree was entered in said foreclosure cause for the principal and interest due on said mortgage bonds on the 12th day of February, A. D. 1879, and that the property and franchises were sold in pur-
58 suance of the terms of said decree, on or about the 12th day of April, 1879, for less than one million dollars, said sum being more than five hundred thousand dollars less than the amount of said decree, for which said balance deficiency decrees were entered by this court in favor of the holders of said mortgage bonds.

And the said defendants admit the pretended sale of said property by the United States marshal for the northern district of Illinois and the attempted redemption thereof by the said bank, as charged in said cross-bill, but the said defendants say that said sale and redemption were without authority of law and were therefore each wholly void.

And the said defendants, further answering, say that they have

no knowledge of the purchase of said certificate of sale by the said Alexander Mitchell, as charged in said cross-bill, but the said defendants deny that said purchase, if made as charged, was in the interest of said Chicago & Pacific Railroad Co. or that said company was benefited thereby or had any interest therein.

And the said defendants, further answering, admit the execution and delivery of a lease of all the property of said Chicago & Pacific Railroad Co. to the said Chicago, Milwaukee and St. Paul Railway Co. and of a trust deed to the Farmers' Loan & Trust Company to secure an issue of three millions of bonds now outstanding, said lease and trust deed bearing date and were executed and
59 delivered April 2nd, A. D. 1880; and the said defendants deny that the lien of said trust deed and lease are junior to the lien of said complainant's said judgment, but, on the contrary, the said defendants charge the fact to be that the lien of both said trust deed and lease are paramount to the lien of said judgment of said complainant.

These defendants, further answering, deny that complainant is entitled to the relief or any part thereof in said cross-bill demanded, and pray to be dismissed with reasonable costs and charges.

THE CHICAGO & PACIFIC RAILROAD COMPANY AND
THE CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY,
By E. WALKER, *Sol'r.*

Endorsed: Filed Apr. 27, 1883. Wm. H. Bradley, clerk.

60 Afterwards, to wit, on the sixteenth day of May, 1883, came The Third National Bank of Chicago, by its solicitors, and filed in said clerk's office its replication to the answer of the The Chicago and Pacific Railroad Company and the Chicago, Milwaukee and St. Paul Railway Company in said entitled cause; which said replication is in the words and figures following, to wit:

Replication.

UNITED STATES OF AMERICA,
Northern District of Illinois, } ss:

Circuit Court of the United States for the Northern District of Illinois.

THE THIRD NATIONAL BANK OF CHICAGO, Complainant,
vs.
THE CHICAGO AND PACIFIC RAILROAD COMPANY The Chicago, Milwaukee and St. Paul Railway Company, and The Farmers' Loan and Trust Company, Defendants. } In Chancery.

The replication of The Third National Bank of Chicago, complainant, to the joint & several answer of said defendants, The Chicago and Pacific Railroad Company and The Chicago, Milwaukee and St. Paul Railway Company.

This repliant, saving and reserving to itself now and at all times hereafter all and all manner of benefit and advantage of ex-
61 ception which may be had or taken to the manifold insufficiencies of the said answer of the said defendants, for replication thereunto says that it will ever maintain and prove its above cross-bill of complaint to be true, certain, and sufficient in the law to be answered unto, and that the said answer of the said defendants is uncertain, untrue, and insufficient to be replied unto by this repliant, without this, that any other matter or thing whatsoever in the said answer contained material or effectual in the law to be replied unto and not herein and hereby well and sufficiently replied unto, confessed and avoided, traversed or denied, is true; all which matters and things this repliant is ready to aver, maintain, and prove as this honorable court shall direct, and humbly prays as in and by its said bill it has already prayed.

THIRD NAT'L BANK OF CHICAGO,
By H. W. JACKSON, *Its Receiver.*

LYMAN & JACKSON, *Sol'rs.*

Endorsed: Filed May 16, 1883. Wm. H. Bradley, clerk.

62 Afterwards, to wit, on the twenty-sixth day of June, 1884, came Henry W. Bishop, one of the masters in chancery of said court, and filed in said clerk's office his report in said entitled cause; which said report, together with the testimony and exhibits thereto attached, are in the words and figures following, to wit:

In the Circuit Court of the United States for the Northern District of Illinois. In Chancery.

THE CHICAGO AND PACIFIC RAILROAD COMPANY and Chicago, Milwaukee and St. Paul Railway Company, Complainants,
vs.
THE THIRD NATIONAL BANK OF CHICAGO and H. W. Jackson, Receiver of the Third National Bank of Chicago, Defendants.
} Gen. No. 18112.

Master's Report of Testimony.

To the honorable judges of said court:

In pursuance of an order referring the above-entitled cause for the purpose of taking testimony and reporting the same to the court, I hereby report that I was, on the twenty-eighth day of February,
63 A. D. 1884, and also on the twenty-second day of April, A. D. 1884, attended by Edwin Walker, Esquire, of counsel for the Chicago and Pacific Railroad Company; by H. W. Jackson, Esquire, receiver of Third National Bank of Chicago, and John H. Thompson, Esquire, of counsel for H. W. Jackson, receiver, and for the Third National Bank of Chicago; that on said days the testimony of said Edwin Walker, he having been duly sworn, was taken, and is herewith reported, together with the exhibits offered in evidence before me in said cause in connection with said testimony.

All of which is respectfully submitted.

H. W. BISHOP,
Master in Chancery of the Circuit Court of the United States for the Northern District of Illinois.

Dated June 26th, A. D. 1884.

64 General No. 18112.

In the Circuit Court of the United States for the Northern District of Illinois.

THE CHICAGO AND PACIFIC RAILROAD COMPANY and Chicago, Milwaukee and St. Paul Railway Company, Complainant-,
vs.
THE THIRD NATIONAL BANK OF CHICAGO and H. W. Jackson, Receiver of the said Third National Bank of Chicago, Defendants.
} In Chancery. Bill and Cross-Bill of the Third National Bank of Chicago.

Testimony taken before Henry W. Bishop, master in chancery of said court, Thursday, the 28th day of February, A. D. 1884.

Present: Edwin Walker, Esqr., of counsel for the Chicago and Pacific Railroad Company; H. W. Jackson, Esqr., receiver of Third National Bank of Chicago, and John H. Thompson, Esqr., of coun-

sel for H. W. Jackson, receiver, and for the Third National Bank of Chicago.

EDWIN WALKER, a witness on behalf of the Chicago & Pacific R. Road Company, being first duly sworn, deposes and says as follows:

65 I was elected president of the Chicago & Pacific Railroad Company in the latter part of the year 1879 or prior to the year 1880, and I was also familiar with the litigation in the case of Blair and others against The Chicago & Pacific Railroad, which resulted in a decree of foreclosure of the mortgage, as stated in the cross-bill and answer. The property was sold for a little more than $900,000 at the public sale by the master in chancery, and the total indebtedness of the company at that time amounted to certainly more than twice the amount the property sold for. For the purpose of raising a sufficient amount of money to redeem the property from sale a new mortgage was executed and bonds to the amount of $3,000,000 were issued under the mortgage. A lease was also executed by the Chicago & Pacific Railroad Company to the Chicago, Milwaukee & St. Paul Railroad Company, as stated in the original bill. The property was redeemed early in April by the payment to Blair, who was the purchaser, of the amount of his bid, together with the statutory interest, as required by the statute in case of redemption. The $3,000,000 first-mortgage bonds issued under the mortgage in 1880 were sold at a little less than their par value. I think they were sold at about 97 or 97½ on a dollar. The lease at that time had been executed and the mortgage was also executed by the Chicago &
66 Pacific Railroad Company and the Chicago, Milwaukee & St. Paul Railroad Company, as lessee, both joining in the mortgage as grantors, and the bonds were also executed by both companies. The road at that time was partially constructed, and only partially constructed from Chicago to a point beyond Elgin, in the neighborhood of Byron or Davis Junction, about 89 miles in length. During the years 1880 and 1881 the road was completed to the Mississippi river, the entire length laid with steel rails, and the road generally put in first-class condition. I don't remember the exact amount of rolling stock sold with the road at the time of the master's sale, but it was an amount insufficient at the time for the prosecution of business, and additional rolling stock was purchased. In Chicago the Chicago & Pacific Railroad Company had acquired but a small amount of property for terminal facilities, and afterwards additional property was purchased by the lessee, the title taken in the Chicago & Pacific Railroad Company. The whole amount of the $3,000,000 bonds has been expended in the completion of the road, construction of a bridge across the Mississippi river, and in the purchase of rolling stock and terminal facilities. Very much of the right of way of the Chicago & Pacific Company at the time of the sale was held under contract and had not been paid for. All these
67 claims have been paid by the lessee since it has been in possession of the property. It is now in possession of the prop-

erty under the lease, and has performed all the covenants and conditions of the lease from the time of its execution until the present time.

The Chicago & Pacific Railroad Company is not in the receipt of any earnings or any income of any kind or character. It has no property of any kind other than the property conveyed to the trustees under the mortgage of 1880, the possession of which has been in the Chicago, Milwaukee and St. Paul under the lease. I know of no property whatever of the Chicago & Pacific Railroad Company that is subject to execution, or of any moneys or assets of any kind or character. In behalf of the defendants in cross-bill I offer to pay the full amount due upon the Tabor judgment referred to in the answer of the Third Nat. Bank and in its cross-bill. The judgment referred to is the judgment of Horace Tabor against the cross-defendants, The Chicago & Pacific Railroad Company, entered on the 9th day of March, 1876, for $3,499.73, principal, interest and costs.

Cross-examination reserved.

68 In the Circuit Court of the United States for the Northern District of Illinois.

THIRD NATIONAL BANK OF CHICAGO, Complainant,
vs.
CHICAGO & PACIFIC R. R. CO. *et al.*, Defendants. } In Chancery.

Testimony taken before Henry W. Bishop, master in chancery of said court, the 22 day of April, A. D. 1884.

Present: Messrs. Thompson and Jackson, for complainant.

EDWIN WALKER, a witness on behalf of the —, being first duly sworn, was examined in chief by Mr. Jackson, and deposes and says as follows:

Q. Have you a copy of the resolutions passed by the Chicago & Pacific Railroad Company authorizing the making of a new mortgage of the Chicago & Pacific Railway Company to the Chicago, Milwaukee & St. Paul, and also the execution of a lease by the Chicago & Pacific to the Chicago, Milwaukee & St. Paul?

A. I have.

Q. State when those resolutions were passed.

A. I think they were passed about the first of April, 1880. I will state, in this connection, that a meeting of the stockholders of
69 the Chicago & Pacific was called at the office at Chicago, and notice was given by publication, as required by the statute, and nearly all the stock was represented at the meeting. About $\frac{9}{10}$ of the stockholders voted in favor of the resolutions authorizing the lease and mortgage, and there was a small portion of the stockholders that voted against it—less than $\frac{1}{10}$. The meeting was held several days before the mortgage and lease were finally executed—a

few days before. It was in the last of March or the first of April that the meeting was held.

Q. Will you offer those resolutions in evidence in this case?

A. Yes.

Paper hereto attached, marked "Exhibit A."

Q. Are you acquainted with Alexander Mitchell?

A. Yes.

Q. What position, if any, does he occupy in the Milwaukee and St. Paul Railway Company?

A. He is president.

Q. How long has he been president?

A. Several years; I don't remember how long.

Q. Prior to 1880?

A. Yes.

Q. He is still president?

A. Still president.

Q. Can you state the value to-day of the property or assets of the Chicago & Pacific Railway Company?

70 A. I cannot state its present value. Its value has been very largely increased since the execution of the lease and mortgage by the extension of the road, the building of the bridge across the Mississippi river, and its connection with the Iowa lines of the Chicago, Milwaukee & St. Paul. It now forms a part of the through line between Omaha and Chicago. I could state what I thought its value was at the time of the execution of the lease if you wish.

Q. Can you state about what to-day is the value of the franchise of the Chicago & Pacific Railway Company?

A. What do you mean by franchise—the right to be a corporation?

Q. Yes.

A. I don't think it has any practical value at all, disconnected from the property of the company, as you can organize under the statute for four or five dollars a company having the same franchise.

Q. The Chicago & Pacific Railway Company is organized under a special charter is it not?

A. It is.

Q. Can you state what has been the net earnings of the Chicago & Pacific Railway Company since the execution of the lease to the Chicago, Milwaukee & St. Paul and the execution of the mortgage by it & and the Chicago, Milwaukee & St. Paul Railroad Company to the present time?

71 A. I could not. I do not think the earnings of that division of the road have been kept separate at all. I am sure that the earnings of the Chicago & Pacific line itself have not.

Q. Can you state how much the bonds of the Chicago & Pacific Railway Company and the Chicago, Milwaukee & St. Paul Railroad Company secured by the mortgage referred to in the bill in this case are worth to-day?

A. I think those bonds are selling in the market at 105 or 106.

Q. Has all the interest which has matured on the bonds been paid?

A. Yes; I so understand.

Q. Can you furnish or have furnished a detailed statement of the manner in which the $3,000,000 raised by the bonds and mortgage referred to has been expended?

A. I don't know whether I could obtain that statement or not. I think it would be very difficult to furnish a detailed statement, for the reason that the entire track of the road between Chicago and Byron has been practically relaid; a good deal of money has been paid out to procure title to the right of way; also, there has been paid out a large amount of money for fencing and for improvements of the grade—that is, by cutting out steep grades—and in building of new station-houses and repairing the track generally.

72 The road at the time of the sale and at the time of the execution of the lease, as a matter of fact, was not more than half built, so that it had to be rebuilt. Then, in addition to that, they extended the line from Byron to the Mississippi river and built a bridge across the river, and the proceeds of the bonds went into all that. I don't think it would be possible for me to show in detail how the money was expended.

Q. Is there any one of the employees of the Chicago & Pacific or the Chicago, Milwaukee & St. Paul who could furnish a detailed statement?

A. I could not tell you that now. I could ascertain; the books are all kept at Milwaukee. I never examined the books.

Q. Was there any portion of the $3,000,000 used in redeeming from the sale under the Blair mortgage referred to in the original bill?

A. The entire amount paid for the redemption of the property from the sale under the Blair foreclosure was paid out of the proceeds of the bonds in this way: The Chicago, Milwaukee & St. Paul Company advanced the money to make that redemption; the redemption was made after the execution of the lease and mortgage under these resolutions. The advance was made by the Milwaukee & St. Paul Company, and they were repaid out of these bonds—the proceeds resulting from the sale of the bonds. Then, in addition to

73 that, they [there] were paid out a large amount of money to various bondholders to satisfy deficiency decrees that were entered in the Blair case in favor of the holders of these bonds. Among others, we had to pay about $80,000 to the holders of the bonds that were hypothecated with the Third National Bank as security for this loan.

Q. Are the earnings of the Chicago & Pacific Railroad Company and the earnings of the Chicago & Milwaukee & St. Paul R. R. Company kept distinct?

A. They are not—at least I understand they are not. There is no reason why they should be kept separate that I am aware of.

Q. What is done with the earnings of the Chicago & Pacific Railroad Company?

A. They go into the general treasury of the Milwaukee & St. Paul Company.

I was asked if Mr. Alexander Mitchell was president of the Chicago, Milwaukee & St. Paul Company. As president of that company he did not redeem the property from Albert Keep, who had purchased it at marshal's sale at a prior date, as referred to in the cross-bill, nor did I, as attorney of the Chicago, Milwaukee & St. Paul, receive the money from the marshal that was paid him for the purpose of redeeming by the Third National Bank.

Q. You were the attorney, however, of the Milwaukee & St. Paul Company at that time?

74 A. I am one of the attorneys.

Q. And was at that time?

A. Yes.

Mr. JACKSON: I now introduce in evidence the marshal's certificate of sale to Albert Keep, and the assignment by Albert Keep and the receipt of Alexander Mitchell, by E. Walker, attorney, of $5,304.20 of the United States marshal.

A copy of which is hereto attached.

Also marshal's certificate of redemption of the Third National Bank of Chicago in the case of Horace Tabor *vs.* Thomas S. Dobbins *et al.*

A copy of which is hereto attached.

Also the execution in the case of The Third National Bank of Chicago *vs.* The Chicago & Pacific Railroad Company, with the endorsement thereon made by the United States marshal.

75 EXHIBIT A.

Dep. of Walker.

Whereas the Chicago & Pacific Railroad Company, in the construction of its said railway and partially equipping the same and procuring the right of way thereto, incurred debts to divers persons, amounting in the aggregate to upwards of two million dollars, which said debts or the greater portion thereof are now outstanding and unpaid and are past due, and the said party of the first part is unable to pay and satisfy the same; and

Whereas the said company, for the purpose of raising money to pay said indebtedness and to construct said railway, did, on or about the first day of October, A. D. 1872, make and execute, under the seal of said company, its negotiable bonds, in sums of one thousand dollars each, to the amount in all of three millions of dollars, and did at the same time make and execute a mortgage deed of trust of its said railway, together with all and singular its property of every description, to the New York State Loan and Trust Company of the City of New York, as trustee, in the usual form of mortgage deeds of trust made by railway companies to secure said bonds, and caused the same to be duly recorded in the several counties through which

said railway was constructed or to be constructed, so as to make the same a lien thereon; and

76 Whereas said bonds were afterwards, to the amount of two million dollars, pledged and hypothecated by said company to divers persons as security of a portion of the notes given for the aforesaid indebtedness of said company and for the purchase of iron and other materials for the construction of said road and loans of money as collateral security for said indebtedness, which said parties have caused the said mortgage deed of trust to be foreclosed by a suit in chancery instituted by John I. Blair *et al.*, for the benefit of all parties so holding said bonds, in the circuit court of the United States for the northern district of Illinois, in which court a decree was entered on the 12th day of February, A. D. 1879, fixing the amount due several holders of said bonds and directing that said railway should be sold, under and in pursuance of said decree, by one of the masters of said court, in pursuance of the rules and practice there, subject to the right of redemption by said party of the first part for one year from and after the date of said sale; and

Whereas afterwards, to wit, on the first day of May, in the year of our Lord one thousand eight hundred and seventy-nine, Henry W. Bishop, one of the masters of said court, charged with the execution of said decree, did, in pursuance of public notice theretofore given, in the city of Chicago, sell at public auction the said railway, to-

77 gether with all its franchises, appurtenances, and property contained in said mortgage in pursuance of said decree, and the same was purchased at said sale by John I. Blair, Edward P. Hatfield, Junior, and William Bayard Cutting for the sum of nine hundred and sixteen thousand one hundred dollars; and

Whereas certain other parties to whom the said company was so as aforesaid indebted have prosecuted their several demands in the superior and circuit courts of Cook county and other courts of the

s State of Illinois, and have procured divers judgments thereon, which now remain unpaid and unsatisfied of record and are a lien upon the property of the said party of the first part, and other of said demands still remain unliquidated; and

Whereas the Chicago, Milwaukee & St. Paul Railway Company, at the request of this company, now proposes to aid the party of the first part in procuring a sufficient sum of money to redeem said property from the aforesaid sale and to protect said property from all the aforesaid valid judgment liens, and also to extend and construct the road of this company to the Mississippi river; also to secure all proper and necessary terminal facilities and depots and grounds along the line; also to relay that part of the road already constructed with steel rails, and to fully equip said road with all necessary rolling stock, so as to make the entire line a first-

78 class railroad in all respects, the entire or aggregate cost of which is estimated at three millions of dollars, for which said sum the said company, by their proper officers, propose to execute their joint and several bonds of one thousand dollars each, bearing date the second day of April, 1880, and becoming due and payable on the 1st day of January, A. D. 1910, bearing interest at

six per cent. per annum, payable semi-annually, viz., on the first days of January and July of each year, at the office *of* agency *or* the party of the second part, in the city of New York, which said bonds are to be secured by a trust deed or mortgage, of even date with said bonds, of all the railroad, franchises, and other property of the party of the first part to the Farmers' Loan and Trust Company of the City of New York; and

Whereas the said Chicago, Milwaukee and St. Paul Railway Company proposes to take up, pay, cancel, and satisfy all of said bonds at their maturity and to meet, pay, and satisfy all the accruing interest on said bonds as the same shall become due and payable, according to the tenor thereof, and forever save this company harmless therefrom; and also to pay all taxes, charges, assessments imposed or assessed or which may be hereafter imposed or assessed upon the property or premises of the Chicago and Pacific Railroad Company; and

79 Whereas the said Chicago and Pacific Railroad Company has no means or resources out of which the necessary amount of money can be realized or provided for the redemption of its property and franchises from said sale under said decree and for the discharge of said judgment liens and completion of its said railroad, as hereinbefore recited, and no pecuniary credit or ability to provide for the same, except by the aforesaid lease to the said Chicago, Milwaukee and St. Paul Railway Company and the execution of said mortgage or trust deed, together with the bonds, to be secured thereby as hereinbefore recited:

Now, therefore, be it resolved, That the Chicago & Pacific Railroad Company, in consideration of the premises, shall grant, devise, and lease unto the Chicago, Milwaukee & St. Paul Railway Company all and singular the railroad now owned by this company and commonly known as the Chicago & Pacific railroad, extending from a point near Chicago avenue, in the city of Chicago, in a westerly direction, by the way of Elgin and Byron, to a junction with the Racine and Southwestern Division of the Chicago, Milwaukee & St. Paul railway, at Freeport; also at or near Lanark, and from thence to the Mississippi river, including in the premises hereby demised all the railroads, railways, ways, and rights

80 of way, and all the depot grounds and other lands, and all the tracks, bridges, viaducts, culverts, fences, and other structures, and all the depots, station-houses, engine-houses, freight-houses, wood-houses, and other buildings, and all the machine shops and other shops appertaining to the said Chicago & Pacific railroad and now owned by the said company, and including also all locomotives, tenders, passengers, baggage, freight, and other cars, and all other rolling stock and equipments belonging to the said company, and also all tools and machinery, boats, and transfer equipment, supplies, and property of every name and nature belonging to said company from the — day of ——, A. D. 1880, for and during the full term of nine hundred and ninety-nine years thence next ensuing, and fully to be completed and ended, with proper covenants on the part of said Chicago, Milwaukee & St. Paul Railroad Company to keep

and hold said Chicago & Pacific Company free and harmless from all loss and damage on account of the bonds and mortgage hereinbefore referred to, and from all taxes or assessments that may be levied upon or assessed against said property during the continuance of said lease, and for the proper preservation and restoration of said property.

And be it further resolved, That if said Chicago, Milwaukee & St. Paul Railroad Company shall accept said lease and duly
81 execute the same that this company will execute with the said Chicago, Milwaukee & St. Paul Railroad Company the joint and several bonds of said company to the amount of three millions of dollars, payable thirty years from the date thereof, with six per cent. interest, payable semi-annually, and for the purpose of securing the payment of said bonds will join said Chicago, Milwaukee & St. Paul Railway Company in a mortgage of all the property hereby authorized to be leased to the Farmers' Loan & Trust Company of New York, as trustee, in the usual form and with the usual covenants of said railway mortgages.

And be it further resolved, That the president and secretary of this company be, and they are hereby, authorized to execute for and in the name of this company the lease, bonds, and mortgage hereinbefore recited and deliver the same for the purposes aforesaid.

82 *Marshal's Certificate of Sale.*

This will certify that by virtue of a writ of *fieri facias*, issued out of the circuit court of the United States for the northern district of Illinois, on the second day of June, A. D. 1881, upon a judgment rendered in said court on the ninth day of March, A. D. 1876, for the sum of three thousand four hundred and ninety-nine $\frac{73}{100}$ dollars damages and twenty-seven $\frac{5}{100}$ dollars costs of suit in a cause wherein Horace Tabor was plaintiff and Thomas S. Dobbins, George S. Bowen, John S. Wilcox, and The Chicago and Pacific Railroad Company, defendants, I levied upon the hereinafter-described real estate situate, lying, and being in the counties hereinafter named, in the State of Illinois, as the property of the above-named defendants; that I thereupon advertised the same for sale by posting advertisements in three of the most public places in the county of Cook, in the State of Illinois, and by publication in a newspaper published in said county, in said State, for three successive weeks previous to the day of sale, as required by law and the rules of said court; that on the twenty-fifth day of June, A. D. 1881, at the hour of eleven o'clock a. m. of said day, at the north door of the United States custom-house, in the city of Chicago, at Chicago, in
83 the county aforesaid, the time and place mentioned in said advertisement, I proceeded to offer the hereinafter-described property for sale at public vendue, in separate parcels, to the highest and best bidder for cash, and receiving no bids for the same when so offered separately, I then offered the whole of said property for sale together, and Albert Keep, being the highest and best bidder therefor when the same was so offered for sale, became the purchaser

of the following-described property, to wit: All and singular the railroad of the Chicago and Pacific Railroad Company as the same is now surveyed, layed, and constructed, and located in the counties of Cook, Du Page, Kane, De Kalb, Ogle, and Carroll, in the State of Illinois, including the road-bed, stations or station-houses, depot grounds, rails, ties, fences, bridges, viaducts, and culverts, and all other buildings and structures, as well as engine-houses, machine, and other shops used in connection with said railway—

All being in the State and northern district of Illinois, for the sum of four thousand eight hundred and twenty-two dollars.

I further certify that unless said premises shall be redeemed from said sale within fifteen months from the date hereof, according to law, the said Albert Keep will be entitled to a deed of the property so purchased by him.

Given under my hand this 25th day of June, A. D. 1881.

84 A. M. JONES,
U. S. Marshal, Northern District of Illinois,
By L. O. GILMAN, *Deputy.*

For and in consideration of the sum of five thousand two hundred and seven dollars and seventy-six cents ($5,206.76) I hereby assign and transfer this certificate of sale to Alexander Mitchell, of Milwaukee, in the State of Wisconsin.

Witness my hand and seal this twenty-fourth day of June, A. D. 1882.

[SEAL.] ALBERT KEEP.

$5,304.20. Received from A. M. Jones, as marshal, five thousand three hundred and four $\frac{20}{100}$ dollars, amount received for redemption in above case of Horace Tabor *vs.* Thomas S. Dobbins, George S. Bowen, John S. Wilcox, and The Chicago and Pacific Railroad Company.

ALEXANDER MITCHELL,
By E. WALKER, *Att'y.*

(On back of foregoing document is the following:)
Marshal's certificate of sale to Albert Keep. Horace Tabor *vs.* Thomas S. Dobbins *et al.* Redeemed Sept. 25, '82. Marshal's costs, $92.52; paid July 16, 1881.

85 *Certificate of Redemption.*

UNITED STATES OF AMERICA, *Northern District of Illinois,* } *ss:*

I, A. M. Jones, marshal of the United States for said northern district of Illinois, do hereby certify that the Third National Bank of Chicago has this day, by the payment to me of the sum of five thousand three hundred and four ($5,304.20) dollars and twenty cents, redeemed the following-described land, to wit: All and singular the railroad of the "Chicago and Pacific Railroad Company" as the same is now surveyed, layed out, constructed, and located in the

counties of Cook, Du Page, Kane, De Kalb, Ogle, and Carroll, in the State of Illinois, including the road-bed, stations or station-houses, depot grounds, rails, ties, fences, bridges, viaducts, and culverts, all other buildings and structures, as well as engine-houses, machine and other shops used in connection with said railway, all being in the State and northern district of Illinois, from a sale made by me, as such marshal, on the twenty-fifth day of June, A. D. 1881, under and by virtue of a *pluries* writ of *fieri facias* issued out of the circuit court of the United States for said northern district of Illinois upon a judgment rendered in said court on the ninth day of March, A. D.
86 1876, in the March term of the said court for the year last above mentioned, in favor of Horace Tabor and against Thomas S. Dobbins, George S. Bowen, John S. Wilcox, and The Chicago and Pacific Railroad Company, said sum being the amount of the purchase-money paid for said lands at said sale, together with interest thereon from the date of said sale at the rate of 8 per cent. per annum.

Witness my hand, at Chicago, in said district, this 25th day of September, A. D. 1882.

A. M. JONES,
U. S. Marshal,
By S. C. HAYES, *Deputy.*

(On back of above document appears the following:)

Marshal's certificate of redemption. To the Third National Bank of Chicago. Horace Tabor *vs.* Thomas S. Dobbins *et al.* Amount paid, $5,304.20. Execution No. 6930. A. M. Jones, U. S. marshal, northern district of Illinois. State of Illinois, Cook county, *ss:* No. 421,891. Recorded Sep. 25, A. D. 1882, 3 o'clock p. m., Book 1264 of Records, page 151. Jas. W. Brockway, recorder.

87 UNITED STATES OF AMERICA,
Northern District of Illinois:

The United States of America to the marshal of the northern district of Illinois, Greeting:

We command you that of the goods and chattels, lands and tenements, of The Chicago and Pacific Railway Company, defendant, in your district you cause to be made the sum of thirty-six thousand two hundred dollars and ninety-six cents, which the Third National Bank of Chicago lately, to wit, on the third day of April, A. D. 1882, in our circuit court of the United States for the northern district of Illinois, before the judges thereof, at Chicago, in the district aforesaid, recovered against the said defendant for damages which said plaintiff had sustained, as well by the occasion of the non-performance of certain promises and undertakings in that behalf and for its costs and charges by it about its suit in this behalf expended, whereof said defendant is convicted, as appears to us of record.

And have you that money at the clerk's office of our said court in ninety days from the date hereof to render to the said plaintiff for its damages and costs aforesaid; and have you there also this writ.

Witness the Hon. Morrison R. Waite, Chief Justice of the
88 Supreme Court of the United States of America, at Chicago aforesaid, this fifteenth day of July, in the year of our Lord
[SEAL.] one thousand eight hundred and eighty-two, and of our Independence the one hundred and seventh.

WM. H. BRADLEY, *Clerk.*

Rec'd July 15, A. D. 1882, 4.25 o'clock p. m.

A. M. JONES,
U. S. Marshal,
By S. C. HAYES, *Deputy.*

By virtue of the within writ I have, this 25th day of September, A. D. 1882, levied upon the following-described property, to wit, all and singular the railroad of the Chicago and Pacific Railroad Company as the same is now surveyed, layed out, constructed, and located in the counties of Cook, Du Page, Kane, De Kalb, Ogle, and Carroll, in the State of Illinois, including the road-bed, station- or station-houses, depot grounds, rails, ties, fences, bridges, viaducts, and culverts, and all other buildings and structures, as well as engine-houses, machine and other shops used in connection with the said railway, all being in the State and northern district of Illinois, and as being the property of said defendant.

A. M. JONES,
U. S. Marshal,
By S. C. HAYES, *Deputy.*

89 I hereby return this writ without sale of property wholly unsatisfied, having — enjoined from making the sale by the U. S. cir. court. Oct. 24, '82.

A. M. JONES,
U. S. Marshal,
By S. C. HAYES, *Deputy.*

Marshal's fees, $33.18, paid by att'y.

(On back of said document is the following:)

274. No. 7046. Circuit court of the United States, northern district of Illinois. Third National Bank of Chicago *v.* Chicago & Pacific Railroad Company. *Fi. fa.*

Damages	$36,165 36
Costs	35 60
Judgment for	$36,200 96
Defendants' costs	60
Collect	$36,201 56

Judgment rendered April 3, A. D. 1882. Wm. H. Bradley, clerk. Filed August 16, A. D. 1883. Wm. H. Bradley, clerk. Lyman & Jackson, plaintiff's att'y.

90 This indenture, made this second day of April, in the year of our Lord one thousand eight hundred and eighty, between the Chicago & Pacific Railroad Company, a corporation duly formed and organized under the laws of the State of Illinois, party of the first part, and the Chicago, Milwaukee & St. Paul Railway Company, a corporation duly formed and organized under the laws of the State of Wisconsin, party of the second part, witnesseth: Whereas the party of the first part is the owner of a certain railway known as the Chicago & Pacific Railroad, extending from the city of Chicago in a westerly direction to Byron, on Rock river, in the State of Illinois, a distance of about eighty-eight miles, with the franchise to extend the same to a connection or connections with the railway of the Chicago, Milwaukee & St. Paul Railway Company, and thence to the Mississippi river; and

Whereas the said party of the first part, in the construction of its said railway and partially equip-ing the same and procuring the right of way thereto, incurred debts to divers persons amounting in the aggregate to upwards of two million dollars, which said debts or the greater portion thereof are now outstanding and unpaid and past due and the said party of the first part is unable to pay and satisfy the same; and

Whereas the said party of the first part, for the purpose of
91 raising money to pay said indebtedness and to construct said railway, did, on or about the first day of October, A. D. 1872, make and execute, under the seal of said company, its negotiable bonds in sums of one thousand dollars each, to the amount in all of three millions of dollars, and did at the same time make and execute a mortgage deed of trust of its said railway, together with all and singular its property of every description, to the New York State Loan and Trust Company of the City of New York, as trustee, in the usual form of mortgage deed of trust made by railway companies, to secure said bonds, and caused the same to be duly recorded in the several counties through which said railway was constructed or to be constructed, so as to make the same a lien thereon; and

Whereas said bonds were afterwards, to the amount of two million dollars, pledged and hypothecated by said company to divers persons as security of a portion of the notes given for the aforesaid indebtedness of said company and for the purchase of iron and other materials for the construction of said road and loans of money as collateral security for said indebtedness, which said parties have caused the said mortgage deed of trust to be foreclosed by a suit in chancery instituted by John I. Blair *et al.*, for the benefit of all parties so holding said bonds, in the circuit — of the United
92 States for the northern district of Illinois, in which court a decree was entered on the 12th day of February, A. D. 1879, fixing the amount due said several holders of said bonds and directing that said railway should be sold under and in pursuance of said decree by one of the masters of said court, in pursuance of the rules and practice thereof, subject to the right of redemption by said party of the first part for one year from and after the date of said sale; and

Whereas, afterwards, to wit, on the first day of May, in the year of our Lord one thousand eight hundred and seventy-nine, Henry W. Bishop, one of the masters of said court, charged with the execution of said decree, did, in pursuance of public notice, theretofore given, in the city of Chicago, sell at public auction the said railway, together with all its franchises, appurtenances, and property contained in said mortgage, in pursuance of said decree, and the same was purchased at said sale by John I. Blair, Edward P. Hatfield, Junior, and William Bayard Cutting for the sum of nine hundred and sixteen thousand one hundred dollars; and

Whereas certain other parties to whom the said party of the second part was so as aforesaid indebted have prosecuted their several demands in the superior and circuit courts of Cook county and
93 other courts of the State of Illinois, and have procured divers judgments thereon, which now remain unpaid and unsatisfied of record and are a lien upon the property of the said party of the first part, and other of said demands still remain unliquidated; and

Whereas the said party of the second part, at the request of the said party of the first part, now proposes to aid the party of the first part in procuring a sufficient sum of money to redeem said property from the aforesaid sale and to protect said property from all the aforesaid valid judgment liens, and also to extend and construct the road of said party of the first part to the Mississippi river; also to secure all proper and necessary terminal facilities and depots and grounds along the line; also to relay that part of the road already constructed with steel rails and to fully equip said road with all necessary rolling stock so as to make the entire line a first-class railroad in all respects, the entire or aggregate cost of which is estimated at three millions of dollars, for which said sum the parties hereto, by their proper officers, propose to execute their joint and several bonds of one thousand dollars each, bearing date the second day of April, A. D. 1880, and becoming due and payable on the 1st day of January, A. D. 1910, bearing interest at six per cent.
94 per annum, payable semi-annually, viz., on the first days of January and July of each year, at the office of agency or the party of the second part, in the city of New York, which said bonds are to be secured by a trust deed or mortgage of even date with said bonds, of all the railroad, franchises, and other property of the party of the first part to the Farmers' Loan and Trust Company of the City of New York; and

Whereas the said party of the second part, at the like request of the party of the first part, proposes to take up, pay, cancel, and satisfy all of said bonds at their maturity, and to meet, pay, and satisfy all the accruing interest on said bonds as the same shall become due and payable according to the tenor thereof, and forever save the said party of the first part harmless therefrom, and also to pay all taxes, charges, or assessments imposed or assessed or which may be hereafter imposed or assessed upon the property or premises of the party of the first part:

Now, therefore, this indenture witnesseth that the said party of the first part, for and in consideration of one dollar, to it in hand paid, and of the premises aforesaid, and of the agreement of the said party of the second part to well and truly perform the agreement hereinafter contained, to take up, pay, satisfy, and discharge
95 and forever save the said party of the first part harmless from said bonds, has granted, demised, and leased, and by these presents does grant, demise, and lease, unto the said party of the second part all and singular the railroad or railway now owned by the said party of the first part and commonly known as the Chicago & Pacific railroad, extending from a point near Chicago avenue, in the city of Chicago, in a westerly direction, by the way of Elgin and Byron, to a junction with the Racine and Southwestern Division of the Chicago, Milwaukee and St. Paul railway at Freeport; also at or near Lanark, and from thence to the Mississippi river, including in the premises hereby demised all the railroads, railways, and rights of way, and all the depot grounds and other lands, and all the tracks, bridges, viaducts, culverts, fences, and other structures, and all the depots, station-houses, engine-houses, freight-houses, wood-houses, and other buildings, and all the machine shops and other shops appertaining to the said Chicago & Pacific railroad and now owned by the said party of the first part, and including also all locomotives, tenders, passengers, baggage, freight, and other cars, and all other rolling stock and equipments belonging to the said party of the first part, and also all tools and machinery, boats and transfer equipment, supplies, and property of every name
96 and nature belonging to said party of the first part, and all rights, privileges, and franchises connected with or relating to said demised railway or to the construction, maintenance, use, or operation of the same; to have and to hold the said railways and premises, with the appurtenances, to the said party of the second part, its successors or assigns, from the second day of April, in the year one thousand eight hundred and eighty, for and during and until the full end of the term of nine hundred and ninety-nine years thence next ensuing and fully to be completed and ended, the said party of the second part, its successors and assigns, during all that time keeping and performing all and singular its covenants and agreements to keep and hold said party of the first part free and harmless from all loss and damage on account of the said bonds and mortgage so as aforesaid executed by the said parties of the first and second parts to the said Farmers' Loan and Trust Company as follows:

Article I. The said party of the second part, in consideration of the said demise and lease so as aforesaid made by the said party of the first part, hereby covenants and agrees that it will take up, pay, cancel, satisfy, and discharge the said three thousand bonds of one thousand dollars each at maturity thereof, and will pay,
97 cancel, and discharge each and every of the coupons or interest warrants attached to the said bonds and each of them as the same shall become due and payable, so as aforesaid to be made and issued to the parties of the first and second parts, and will

during the continuance of this lease at all times save the said party of the first part free and harmless therefrom and from the mortgage so as aforesaid to be executed by the said parties of the first and second parts to the Farmers' Loan and Trust Company on the second day of April, 1880.

Article II. The said party of the second part further agrees that it will at its own, proper cost and expense, operate and run the said demised railway at all times during the said term in the same manner as the said party of the first part, as the owner thereof, is now or shall or may at any time hereafter be required by law to do, and the said party of the second part shall and will, at its own proper cost and expense, preserve and keep the railway and premises hereby demised and every part of the same in thorough repair, working order, and condition and supplied with rolling stock and equipment, so that the business of the said demised railway shall be preserved, encouraged, and developed; and the party of the second part hereby promises and agrees that it will, at its own proper cost and
98 expense, from time to time and whenever needed during the term, aforesaid do or cause to be done to and upon the said demised railway and premises any and all repairs, replacements, and renewals, and that it will pay and satisfy all taxes that may be levied upon said premises, either by the State or National Government.

Article III. The said party of the second part hereby covenants, promises, and agrees to and with said party of the first part that at the end of said term, or other sooner determination of this said lease, the said party of the second part shall redeliver and surrender up to the party of the first part, its successors or assigns, the said demised railway and premises in as good order and condition as the same shall be delivered to the said party of the second part under this lease, and with such additions, betterments, and improvements as shall have been made thereto; also all the rolling stock, equipment, and other property delivered under this lease in as good order and condition as reasonable use and wear thereof, proper repairs and replacements thereof being made from time to time, will permit, or rolling stock, equipment, and other similar property equal in value thereto.

Article IV. And the said party of the first part hereby covenants, promises, and agrees to and with the said party of the second part, its successors or assigns, that the said party of the first part,
99 its successors or assigns, shall and will at any time or times hereafter and whenever thereunto requested by the said party of the second part, its successors or assigns, execute, acknowledge, and deliver to the said party of the second part, its successors or assigns, at the proper cost and expense of the said party of the second part, its successors or assigns, any and all such other and further instruments and assurances in the law for the better dismissing and leasing of the said railway and premises to the said party of the second part, its successors or assigns, as by the said party of the second part, its successors or assigns, or by its or their counsel learned in the law shall be reasonably advised, devised, and required.

In witness whereof the parties hereto have caused their respective corporate seals to be hereunto affixed and the same to be attested by the signatures of their respective president, general manager, and secretaries the day and year first above written.

THE CHICAGO & PACIFIC RAILROAD COMPANY,
By E. WALKER, *President.*
[Seal Chicago & Pacific R. R. Co., Chicago, Ill.]

Attest: LESLIE CARTER, *Secretary.*

THE CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY,
100 By S. S. MERRILL, *General Manager.*
{ Seal Chicago, Milwaukee and St. Paul Railway Company, Incorporated 1863. }

Attest: R. D. JENNINGS, *Secretary.*

STATE OF ILLINOIS, } ss:
County of Cook, }

Be it known that on the seventh day of April, A. D. 1880, before me, the undersigned, a notary public duly commissioned in and for said county, and duly authorized to administer oaths and take acknowledgment of deeds, came Edwin Walker, president, and Leslie Carter, secretary, of the Chicago & Pacific Railroad Company, who, by me being duly sworn, did each depose and say that they are respectively president and secretary of the said company; that they know the seal of said company, and that the seal affixed to the foregoing instrument was affixed by order of the company, and that they signed their respective names thereto, as president and secretary, by the like order, and that they severally acknowledged the execution thereof to be their free act and deed and the free act and deed of said Chicago & Pacific Railroad Company for the purposes therein expressed.

And I certify that they are personally known to me to be
101 the persons they are above described to be and who executed this instrument; and I further — that the foregoing instrument is executed according to the forms of law required by the State of Illinois.

Seal Frank J. Loesch, Notarial Seal, Chicago, Cook Co., Ills.

In witness whereof I have hereunto set my hand and affixed my notarial seal on the day and year above named.

FRANK J. LOESCH,
Notary Public.

STATE OF WISCONSIN, } ss:
County of Milwaukee, }

Be it known that on the 7th day of April, A. D. 1880, before me, the undersigned, a notary public, duly commissioned in and for said

county, and duly authorized to administer oaths and take acknowledgment of deeds, came S. S. Merrill, general manager, and R. D. Jennings, secretary, of the Chicago, Milwaukee & St. Paul Railway Company, who, by me being duly sworn, did each depose and say that they are respectively general manager and secretary of the said company; that they know the seal of said company, and that the seal affixed to the foregoing instrument was affixed by order of the company, and that they signed their respective names thereto as general manager and secretary by the like order, and that
102 they severally acknowledged the execution thereof to be their free act and deed and the free act of said Chicago, Milwaukee & St. Paul Railway Company for the purposes therein specified.

And I certify that they are personally known to me to be the persons they are above described to be and who executed this instrument.

And I further certify that the foregoing instrument is executed according to the forms of law required by the State of Illinois.

Seal William S. Milligan, Notary Public, Milwaukee Co., Wis.

In witness whereof I have hereunto set my hand and affixed my notarial seal on the day and year above named.

WILLIAM S. MILLIGAN,
Notary Public.

STATE OF ILLINOIS, }
Cook County. }

Doc. 265,590.

This instrument was filed for record in the recorder's office of Cook county on the 8th day of April, A. D. 1880, at the hour of 3 o'clock p. m., and duly recorded in Book 941 of Records, page 112.

JAS. W. BROCKWAY, *Recorder.*

103 STATE OF ILLINOIS, }
County of Cook, } *ss:*

I, James W. Brockway, recorder of deeds in and for said county, in the State aforesaid, do hereby certify that the annexed is a true and correct copy of the record of a certain instrument filed in my office the eighth day of April, A. D. 1880, as Document No. 265,590, and recorded in Book 941 of Records, at page 112.

In testimony whereof I have hereunto set my hand and
[SEAL.] affixed my official seal, at Chicago, this sixth day of May, A. D. 1884.

JAS. W. BROCKWAY, *Recorder.*

(Endorsed:) Filed June 26, 1884. Wm. H. Bradley, clerk.

104 Afterwards, to wit, on the twenty-fourth day of November, in the adjourned October term of said court, 1885, in the record of the proceedings thereof in said entitled cause, before Hon. Walter Q. Gresham, circuit judge, is the following entry, to wit:

Order.

CHICAGO AND PACIFIC RAILROAD COMPANY
vs.
THIRD NATIONAL BANK OF CHICAGO. } In Chancery.

Now come the parties, by their solicitors, and this cause, being set for hearing this day upon the pleadings and proofs, now comes on to be heard, and, after hearing arguments of counsel in part, further hearing herein is hereby postponed until to-morrow morning.

On the same day, to wit, on the twenty-fourth day of November, in the adjourned October term of said court, 1885, in the record of the proceedings thereof in said entitled cause, before Hon. Walter Q. Gresham, circuit judge, is the following entry, to wit:

Order.

CHICAGO AND PACIFIC RAILROAD COMPANY *et al.*
vs.
THIRD NATIONAL BANK OF CHICAGO *et al.* } In Chancery. Original Bill.

and

105 THIRD NATIONAL BANK OF CHICAGO *et al.*
vs.
THE CHICAGO AND PACIFIC RAILROAD COMPANY *et al.* } Cross-Bill.

The complainant in the cross-bill, by its counsel, moves the court to amend its cross-bill so as to conform to the testimony in the record; and the Chicago, Milwaukee and St. Paul Railway Company and the Chicago and Pacific Railroad Company, by Mr. Walker, their solicitor, object to such amendment, and the court takes said motion under advisement, and said cause now comes on to be heard, and, upon hearing of arguments in part, the further hearing herein is postponed until to-morrow morning.

Afterwards, to wit, on the twenty-fifth day of November, in the adjourned October term, 1885, in the record of the proceedings thereof in said entitled cause, before Hon. Walter Q. Gresham, circuit judge, is the following entry, to wit:

Order.

THE CHICAGO AND PACIFIC RAILROAD COMPANY
vs.
THE THIRD NATIONAL BANK OF CHICAGO. } In Chancery.

Now again come the parties herein, by their solicitors, and this cause again comes on to be heard upon the pleadings and
106 proofs, and, after hearing the concluding arguments of counsel, the court takes the same under advisement.

Afterwards, to wit, on the first day of February, 1886, in the December term of said court, 1885, in the record of the proceedings thereof in said entitled cause, before Hon. Walter Q. Gresham, circuit judge, is the following entry, to wit:

Order.

THE CHICAGO AND PACIFIC RAILROAD COMPANY *et al.*
vs.
THE THIRD NATIONAL BANK OF CHICAGO *et al.*
} In Chancery.

Come the parties, by their respective counsel, for the purpose of settling a decree according to the finding of the court, and the counsel for the cross-complainant saying they would not insist upon their motion, heretofore made, to amend their cross-bill, and, the counsel for complainants in original bill saying he is not prepared to present his objections to the decree, the further hearing of this cause is postponed.

107 Afterwards, to wit, on the fifteenth day of February, 1886, came the Third National Bank of Chicago, by its solicitors, and filed in said clerk's office its amended cross-bill in said entitled cause; which said amended cross-bill is in the words and figures following, to wit:

Amended Cross-Bill.

Circuit Court of the United States for the Northern District of Illinois.

CHICAGO AND PACIFIC RAILWAY COMPANY *et al.*
vs.
THIRD NATIONAL BANK OF CHICAGO *et al.*
} In Chancery. Bill.

THIRD NATIONAL BANK OF CHICAGO *et al.*
vs.
THE CHICAGO AND PACIFIC RAILWAY COMPANY *et al.*
} Cross-Bill.

Amendments to the cross-bill of the Third National Bank of Chicago in above-entitled cause.

Insert before prayer for relief, commencing "Forasmuch, therefore," near top of thirty-second page of printed pleadings, the following:

Your orator further shows that on the second day of April, A. D. 1880, the Chicago and Pacific Railroad Company executed to the Chicago, Milwaukee, and St. Paul Railway Company a
108 lease of its railroad and all its property for the term of 999 years, and that on or about the same date the Chicago and Pacific Railroad Company and the Chicago, Milwaukee and St. Paul Railway Company made a joint trust deed upon all the property of the Chicago and Pacific Railway Company to the Farmers' Loan and Trust Company to secure a series of bonds, amounting to the sum of three millions of dollars ($3,000,000); that said bonds were sold and the proceeds, amounting to nearly the sum of three millions of dollars, received by the Chicago, Milwaukee and St. Paul Railway Company; that in said lease no rentals whatever were reserved or to be paid for the property of said Chicago and Pacific Railroad Company for said term of 999 years; that the considera-

tion for the making of said lease was that the Chicago, Milwaukee, and St. Paul Railway Company should aid the Chicago and Pacific Railroad Company in procuring a sufficient sum of money to redeem the property of the Chicago and Pacific Railroad Company from a sale made upon the foreclosure of a mortgage made to the New York Farmers' Loan and Trust Company to pay all judgments and demands against the Chicago and Pacific Railroad Company, to extend and construct the road to the Mississippi river, to secure all proper and necessary terminal facilities and depots and grounds along the line, to relay that part of the road then constructed
109 with steel rails, and to fully equip the road with all necessary rolling stock, so as to make the entire line a first-class railroad in all respects, the entire cost of which was estimated at three million dollars.

That the Chicago, Milwaukee and St. Paul Railway Company redeemed said property from the said foreclosure sale and completed said road to the Mississippi river and took possession of the railroad and property of the said Chicago and Pacific Railroad Company immediately after the making of said lease, and has ever since been in the enjoyment and use of said railroad and property, but has wholly failed and neglected to pay, out of the proceeds of said three millions of bonds or in any other way, the judgment of said Horace Tabor and the demand of your orator now in judgment; that, instead of applying enough of the proceeds of said bonds to pay and satisfy these claims, the said Chicago, Milwaukee and St. Paul Railway Company used a large portion of the proceeds of said bonds in building a bridge across the Mississippi river, and thereby misapplied a large portion of the proceeds of said bonds and used the same for another purpose than those for which said bonds were issued.

And your orator charges and asserts that by the arrangement between the said companies and by its acceptance of said lease and the use and enjoyment of said property and by the receipt of the proceeds of said bonds the said Chicago, Milwaukee and St.
110 Paul Railway Company was bound in law and equity to apply enough of the proceeds of said bonds to pay and satisfy the said judgment in favor of said Horace Tabor and the demand of your orators, and is bound to pay to your orator the amount of money paid upon the redemption of said property from the sale under said Tabor judgment, with interest and costs, and the amount of said judgment in favor of your orator, with interest and costs, and costs of this suit.

Insert before prayer for general relief, commencing, "And that your orator," etc., the following: Or that the said Chicago, Milwaukee and St. Paul Railway Company may be decreed to pay to your orator the amount paid by your orator upon the redemption of the property of the Chicago and Pacific Railroad Company from the sale made on execution issued on the judgment of said Horace Tabor, with interest and costs, and the amount of said judgment recovered by your orator against the said Chicago and Pacific Railroad Com-

pany, with interest and costs, by a short day to be specified in said decree.

LYMAN & JACKSON,
Sol's for Third Nat'l Bank of Chicago.

J. H. THOMSON, *Of Counsel.*

Endorsed: Filed Feb'y 15, 1886. Wm. H. Bradley, cl'k.

111 On the same day, to wit, on the fifteenth day of February, 1886, in the December term of said court, 1885, in the record of the proceedings thereof in said entitled cause, before Hon. Walter Q. Gresham, circuit judge, is the following entry, to wit:

Order.

CHICAGO AND PACIFIC RAILROAD COMPANY *et al.*
vs.
THIRD NATIONAL BANK OF CHICAGO *et al.*
} In Chancery.

This cause coming on for further hearing and counsel for the respective parties being present and the court being fully advised in the premises, it is ordered, adjudged, and decreed that said defendants, Huntington W. Jackson, receiver, and the Third National Bank of Chicago, their successors and assigns, and their counselors, attorneys, solicitors, officers, and agents, be, and they are hereby, perpetually enjoined and restrained from further proceeding under the writ of *fieri facias* issued out of this court on the fifteenth day of July, A. D. 1882, upon a judgment recovered in said court on the third day of April, A. D. 1882, in favor of said defendant, The Third National Bank of Chicago, and against said complainant, The Chicago and Pacific Railroad Company, and that the marshal be, and he is hereby, perpetually enjoined and restrained from selling
112 under the levy of said writ, on the twenty-fourth day of October, 1882, or at any other time, or from interfering under said writ with the rights, property, or franchises of said Chicago and Pacific Railroad Company in any way whatever, and the levy under said writ is hereby released, and it is further ordered and decreed that said defendants pay the costs of these proceedings.

On the same day, to wit, on the fifteenth day of February, 1886, came the Chicago, Milwaukee and St. Paul Railway Company, by its solicitor, and files in said clerk's office its exceptions to the decree in said entitled cause; which said exceptions are in the words and figures following, to wit:

United States Circuit Court, Northern District of Illinois.

CHICAGO AND PACIFIC RAILROAD COMPANY and THE CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY, Complainants,
vs.
THIRD NATIONAL BANK OF CHICAGO and HUNTINGTON W. JACKSON, Receiver of The Third National Bank of Chicago.

113 THIRD NATIONAL BANK OF CHICAGO, Complainant,
vs.
CHICAGO and PACIFIC RAILROAD COMPANY and THE CHICAGO, Milwaukee and St. Paul Railway Company and The Farmers' Loan and Trust Company.

Now comes The Chicago, Milwaukee and St. Paul Railway Company, the above-named cross-defendant, and by E. Walker, its solicitor, files the following exceptions to the draft of decree presented for enrollment in the above-entitled cause:

1st. Said draft of decree does not correctly recite the provisions and conditions of said lease executed by the Chicago and Pacific Railroad Company to this cross-defendant.

2d. The finding of the court "that said bonds were sold and the proceeds, amounting to nearly three millions of dollars, were received by the Chicago, Milwaukee and St. Paul Railway Company" is not sustained by the proofs in said cause.

3d. The finding by the court that "The Chicago, Milwaukee and St. Paul Railway Company constructed a bridge across the said Mississippi river with the proceeds of said bonds" is not supported by the proof and is not authorized by the original cross-bill and answer & the issues tendered thereunder.

4th. Said draft of decree does not conform to the allega-
114 tions in the pleadings nor the proofs in said cause. Neither the pleadings nor the proof authorize a personal decree against this cross-defendant.

Whereof this defendant says that, for said causes and other good and sufficient reasons appearing in said record, said draft of decree ought not to be enrolled.

CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY,
By E. WALKER, *Solicitor.*

Endorsed: Filed Feb'y 15, 1886. Wm. H. Bradley, cl'k.

Afterwards, to wit, on the first day of March, in the adjourned March term of said court, 1886, in the record of the proceedings thereof in said entitled-cause, before Hon. Walter Q. Gresham, circuit judge, is the following entry, to wit:

115 CHICAGO & PACIFIC RAILROAD COMPANY and The Chicago, Milwaukee & St. Paul Railway Company
vs.
THIRD NATIONAL BANK OF CHICAGO and HUNTINGTON W. JACKSON, as Receiver of the Third National Bank of Chicago,
} In Chancery. Bill.

and

THIRD NATIONAL BANK OF CHICAGO
vs.
CHICAGO & PACIFIC RAILROAD COMPANY and THE Chicago, Milwaukee & St. Paul Railway Company, and The Farmers' Loan and Trust Company.
} Cross-Bill.

Come now again the parties by their respective counsel, and the solicitors for the cross-complainant ask that the amendments which they prayed at the hearing might be made to their cross-bill to conform the pleadings to the proof be now made; to which the defendants, by their solicitor, objects for the reason that said amendment makes substantially a new cause, tenders a new issue, prays for other and additional relief; and, after hearing the arguments of counsel, the court allows the cross-bill to be amended as prayed by the cross-complainant to conform the pleadings to the evidence in the record, and thereupon the defendants in the cross-bill move the court for leave to file the following answer:

116 In the United States Circuit Court, Northern District of Illinois. January Term, A. D. 1886.

CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY *et al.*
vs.
THIRD NATIONAL BANK OF CHICAGO *et al.*

THIRD NATIONAL BANK OF CHICAGO, Cross-Complainant,
vs.
THE CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY *et al.*, Cross-Defendants.

A separate answer by the Chicago, Milwaukee and St. Paul Railway Company to the amended cross-bill.

By leave of court the above-named cross-defendant, for answer to said amended cross-bill, says it admits the execution of said lease and said joint trust deed upon all the property of the Chicago and Pacific Railroad Company and the issue of bonds, amounting, at par value, to the sum of 3,000,000 of dollars, and says that said bonds, by authority of the said Chicago and Pacific Railroad Company, were sold by the said cross-defendant.

The said cross-defendant, further answering, says that the consideration for the making of said lease and the covenants
117 therein contained for the payment of rent, and other covenants to be kept and performed by said cross-defendant, are fully set forth and stated in said lease, and the said cross-defendant

says that it never has assumed any other covenants or obligations other than those contained in said lease.

The said cross-defendant, further answering, admits that it advanced the money to the said Chicago and Pacific Railroad Company for the redemption of said property from said foreclosure sale; that it entered into possession of all said property under and by virtue of the terms and provisions in said lease contained, and says that it has fully kept, performed, and maintained all of the terms, conditions, and obligations in said lease assumed by said cross-defendant. It admits that it has not paid the said judgment of the said Tabor or the demand or judgments of the said cross-complainant; and, further answering, charges the fact to be that it never assumed or undertook to pay or discharge either of said claims, demands, or judgments.

And the said cross-defendant, further answering, says and charges the fact to be that it has heretofore, in providing means for the said Chicago and Pacific Company to redeem its said property from said foreclosure sale, and in the construction of said road from Byron to the Mississippi river, in the purchase of necessary equipment and terminal facilities in Chicago and at Savanna, the western
118 terminus of said road, and in the building of necessary depots, machine shops, and station-houses it has expended in and about the same more than the entire amount of money resulting from the sale of said bonds. The said defendant says that it advanced the said Chicago and Pacific Company for the redemption of its said property and the payment of costs and expenses connected therewith about the sum of $1,100,000, and in addition thereto it has been compelled to pay, satisfy, and discharge all the deficiency decrees heretofore entered by this court in said foreclosure proceedings about the sum of $400,000, and has also paid, discharged, and satisfied a large number of judgment liens existing and in full force at the time — execution of said lease, amounting to about the sum of $200,000, and that the aggregate amount expended by this cross-defendant in and about the matters hereinbefore referred to is about the sum of $4,000,000, and therefore this cross-defendant says that if any portion of the proceeds of said bonds were used in and about the construction of said bridge such use was not a fraud upon any of the judgment creditors of the said Chicago and Pacific Railroad Company, for the reason that said defendant expended more than the full amount of said proceeds in the construction, completion, and equipment of said road and in the discharge of other claims and obligations referred to in the preamble and resolutions attached to said lease.

And the said defendant, further answering, denies that, by any arrangement or agreement between this defendant or
119 the Chicago and Pacific Company, or by the acceptance of said lease or the use and enjoyment of said property, or by the receipt of the proceeds of the said bonds, this defendant assumed to pay and discharge the said judgment heretofore rendered in favor of the said Horace Tabor, or that it is bound in law or equity to pay or discharge said judgment, and especially denies that it ever as-

sumed, undertook, or agreed, or that it is bound to pay the said cross-complainant the amount of money paid for the pretended redemption of said property from sale under said Tabor judgment or the amount of the said judgment in favor of the said cross-complainant, and especially denies that it ever diverted any part of the proceeds of the said mortgage bonds from the intended purpose and use, as alleged in the said cross-bill, and especially denies that said cross-complainant has any just claim or demand, either in law or in equity, against this respondent.

And the said respondent denies that said cross-complainant is entitled to their relief or any part thereof in said amended cross-bill demanded, and prays to be dismissed with the reasonable costs and charges.

CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY,
By E. WALKER, *Solicitor.*

120 To which leave is denied by the court.

This cause came on for further hearing on the cross-bill, the pleadings, and proof and was argued by counsel; and it appearing to the court that the Chicago & Pacific Railroad Company was organized in 1865 by a special act of the Legislature of the State of Illinois to construct and operate a railroad from Chicago to the Mississippi river, all lying in the State of Illinois; that on the 1st day of October, 1872, it executed a trust deed or mortgage to secure an issue of $5,000,000 of its bonds; that in May, 1876, suit was commenced in the circuit court of the United States for the northern district of Illinois to foreclose said mortgage, and in May, 1879, the property and franchises of said company were sold, subject to redemption, under a decree previously rendered in said foreclosure suit, to John I. Blair and others for $916,100; that on the 2nd day of April, 1880, the company, with the approval of its stockholders, executed a lease of its railroad and other property, including all its rights, privileges, and franchises, to the Chicago, Milwaukee & St. Paul Railway Company for the term of 999 years, in and by which lease it was, among other things, provided that—

Whereas certain other parties to whom the Chicago & Pacific Railroad Company was so as aforesaid indebted have prosecuted their several demands in the superior and circuit courts of
121 Cook county and other courts in the State of Illinois, and have procured divers judgments thereon, which now remain unpaid and unsatisfied of record; and whereas the Chicago, Milwaukee & St. Paul Railway Company, at the request of the Chicago & Pacific Railroad Company, now proposes to aid the said Chicago & Pacific Railroad Company in procuring a sufficient sum of money to redeem said property from the aforesaid sale and to protect said property from all the aforesaid valid judgment liens, and also to construct the railroad of said Chicago & Pacific Railroad Company to the Mississippi river, and also to secure all proper and necessary terminal facilities and depot grounds along the line, and also to lay that part of the road already constructed with steel rails and fully equip

said road with all necessary rolling stock, so as to make the entire line a first-class railroad in all respects, the entire or aggregate cost of which is estimated at $3,000,000, for which said sum the parties hereto, by their proper officers, propose to execute their joint and several bonds of $1,000 each, bearing date the second day of April, 1880, and becoming due and payable on the first day of January, 1910, bearing interest at six per cent. per annum, payable semi-annually, which said bonds are to be secured by a trust deed or mortgage of even date with said bonds upon all the railroad franchises and other property of the party of the first part to the Farmers' Loan and Trust Company of the City of New York; and

122 whereas the Chicago, Milwaukee & St. Paul Railway Company, at the like request of the Chicago & Pacific Railroad Company, proposes to take up, pay, and cancel or satisfy all of said bonds at their maturity and to meet, pay, and satisfy all the accruing interest on said bonds according to the tenor thereof and forever save the Chicago & Pacific Railroad Company harmless therefrom, and also to pay all taxes, charges, or assessments imposed or assessed or which may be hereafter imposed or assessed upon the property and premises of the Chicago & Pacific Railroad Company:

Now, therefore, the Chicago & Pacific Railroad Company, for and in consideration of one dollar, to it in hand paid, and of the premises aforesaid and of the agreement of the said Chicago, Milwaukee & St. Paul Railway Company to well and truly perform the agreement to take up, pay, and satisfy and forever save the said Chicago & Pacific Railroad Company harmless from said bonds, has granted, demised, and leased its railroad and other property, including its rights, privileges, and franchises, to the Chicago, Milwaukee & St. Paul Railway Company.

And it further appearing to the court that concurrently with the execution of said lease the Chicago & Pacific Railroad Company and the Chicago, Milwaukee & St. Paul Railway Company executed a joint trust deed upon all the property of the Chicago & Pacific Railroad Company to secure the payment of their joint and several bonds to the amount of three thousand one-thousand-

123 dollar six per cent. bonds, all of which were duly executed by both companies; that said bonds were sold and the proceeds, amounting to nearly $3,000,000, were received by the Chicago, Milwaukee & St. Paul Railway Company;

And it further appearing to the court that the receiver who had been in possession of the said Chicago & Pacific Railroad Company during the said foreclosure proceedings was discharged on or about the first day of June, 1880, at which time the said Chicago, Milwaukee & St. Paul Railway Company entered into possession of all of said leased property, and has ever since continued in possession thereof; and it further appearing to the court that the Chicago, Milwaukee & St. Paul Railway Company extended the road of the Chicago & Pacific Railroad Company to the Mississippi river at Savanna, where it, the Chicago, Milwaukee & St. Paul Railway Company, constructed a bridge across the said Mississippi river with the pro-

ceeds of said bonds, and has ever since operated the road as part of its line between Chicago and Omaha;

And it further appearing to the court that on the 9th day of March, 1876, Horace Tabor recovered a judgment in the United States circuit court for the northern district of Illinois against the Chicago & Pacific Railroad Company for $3,499.73, and $27.05, costs of suit; that on the 19th February, 1880, the Third National Bank of Chicago brought suit against the Chicago & Pacific Rail-
124 road Company in the same court, and that upon the 3rd day of April, 1882, the said Third National Bank of Chicago recovered a judgment against the said Chicago & Pacific Railroad Company for $36,165.36, and $36.20, costs of suit, the latter judgment being for money loaned to the Chicago & Pacific Railroad Company by the Third National Bank of Chicago before the execution of its said lease to the Chicago, Milwaukee & St. Paul Railway Company;

And it further appearing to the court that on June 5th, 1881, the United States marshal for the northern district of Illinois sold the Chicago & Pacific railroad to Albert Keep for $4,822.00, on an execution to satisfy the said judgment rendered in favor of Horace Tabor, and delivered to said purchaser a certificate of sale therefor, and that the said certificate of sale was assigned to Alexander Mitchell, who then was and still is the president of the Chicago, Milwaukee & St. Paul Railway Company; that on the 25th day of September, 1882, the Third National Bank of Chicago, as a judgment creditor of the Chicago & Pacific Railroad Company, paid to the United States marshal for the northern district of Illinois $5,304.20 to redeem from the last-named sale to Albert Keep, and that said Alexander Mitchell accepted the money so paid by the Third National Bank of Chicago to the United States marshal as aforesaid and receipted for it;

And it appearing to the court that the complainant in
125 the cross-bill and its amendments is entitled to relief:

Now, therefore, be it ordered, adjudged, and decreed that the Chicago, Milwaukee & St. Paul Railway Company pay in to the clerk of this court, within thirty days, a sum of money sufficient to satisfy the judgment, costs and interest, rendered in favor of The Third National Bank of Chicago against The Chicago & Pacific Railroad Company, including also the amount, with interest, paid by the Third National Bank of Chicago to the United States marshal for the northern district of Illinois to redeem from the sale to Albert Keep as aforesaid; and it is further ordered, adjudged, and decreed that in case the Chicago, Milwaukee & St. Paul Railway Company shall fail to pay said sum of money aforesaid within said thirty days the Third National Bank of Chicago may move the court for the appointment of a receiver, with the usual power of receivers, to take possession of the said leased property and to operate it until the amount due to the said Third National Bank of Chicago upon its judgment as aforesaid, with the costs and interest thereon, and the amount, with interest thereon, so paid by the Third National Bank of Chicago to the United States marshal for the northern dis-

trict of Illinois to redeem from said sale to Albert Keep is paid out of the earnings of said road, and for any other proper relief.

It is further ordered that the complainant in the cross-
126 bill recover its costs of the defendant in said cross-bill, The Chicago, Milwaukee & St. Paul Railway Company, to be taxed.

And thereupon the cross-defendant, The Chicago, Milwaukee & St. Paul Railway Company, prays an appeal from the decree entered in said cross-cause to the supreme court, which the court allows upon the filing of a bond, with surety to be approved by the court, in the sum of $10,000, which bond shall operate as a supersedeas.

127 Afterwards, to wit, on the twenty-fifth day of March, 1886, there was filed in said clerk's office an appeal bond in said entitled cause; which said appeal bond is in the words and figures following, to wit:

Appeal Bond.

Know all men by these presents that we, Chicago, Milwaukee and Saint Paul Railway Company, as principal, and Edwin Walker, as surety, are held and firmly bound unto the Third National Bank of Chicago in the penal sum of ten thousand ($10,000.00) dollars, lawful money of the United States; for the payment of which said sum, well and truly to be made, we bind ourselves, our successors, heirs, representatives, and assigns, jointly and severally, firmly by these presents.

In witness whereof we have caused this instrument to be duly executed and sealed with our seals this seventeenth day of March, A. D. 1886.

The condition of the above obligation is such that whereas The Chicago, Milwaukee and Saint Paul Railway Company, above bounden, has prosecuted an appeal to the Supreme Court of the United States in a certain cause in the circuit court of the United States in and for the northern district of Illinois, entitled Chicago and Pacific Railroad Company and Chicago, Milwaukee and Saint Paul Railway Company *vs.* Third National Bank of Chicago and Huntington W. Jackson, as receiver of the Third National Bank of Chicago (original bill), and Third National Bank of Chicago *vs.*
Chicago and Pacific Railroad Company and The Chicago, Mil-
128 waukee and Saint Paul Railway Company and The Farmers' Loan and Trust Company (cross-bill), from the decree entered therein on the first day of March, A. D. 1886, at the March term of said court, against said Chicago, Milwaukee and Saint Paul Railway Company:

Now, therefore, if the above-named Chicago, Milwaukee and Saint Paul Railway Company shall prosecute its said appeal to effect and

shall answer all costs if it fails to make good its plea, then this obligation to be void; otherwise to remain in full force and virtue.

[SEAL.] CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY CO.,
By P. M. MYERS, *Secretary.*
EDWIN WALKER. [SEAL.]

Approved:
W. Q. GRESHAM,
Circuit Judge.

Endorsed: Filed March 25th, 1886. Wm. H. Bradley, cl'k.

129 NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, William H. Bradley, clerk of the circuit court of the United States for said district, do hereby certify the above and foregoing to be a true and correct transcript of the record of all the proceedings had in said court in the cause wherein The Chicago and Pacific Railroad Company and The Chicago, Milwaukee and St. Paul Railway Company are the complainants and The Third National Bank of Chicago, Huntington W. Jackson, as receiver of the Third National Bank of Chicago, *et al.*, are the defendants, as the same appear from the files and records of said court now remaining in my custody and control.

Seal of Circuit Court U. S., Northern Dist., Illinois, 1885.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office, in Chicago, in said district, this twenty-second day of September, 1886.

WM. H. BRADLEY, *Clerk.*

Endorsed on cover: N. Illinois C. C. U. S. No. 450. The Chicago, Milwaukee & St. Paul Railway Company, appellant, *vs.* The Third National Bank of Chicago. Filed October 13, 1886.

Office Supreme Court U. S.
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JAMES H. McKENNEY,
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BRIEF FOR APPELLANT.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

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vs.

THE THIRD NATIONAL BANK OF CHICAGO.

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Abstract of Case.

On the 18th day of October, 1882, the Chicago and Pacific Railroad Company and the Chicago, Milwaukee and St. Paul Railway Company filed their joint bill in the Circuit court of the United States for the Northern district of Illinois, for injunction.

The bill charges that the Chicago and Pacific Railroad Company was organized under a special act of the Legislature of the State of Illinois, passed and approved on the 16th day of February, A. D. 1865, with authority to construct and operate a line of railroad from the city of Chicago to the Mississippi river, within the State of Illinois; and that the construction of said railroad was commenced in the summer of 1872. That, for the purpose of procuring moneys to construct its road, the company executed its certain deed of trust, conveying to the trustees therein named all its property, real and personal, then owned by said company, or that might thereafter be acquired, together with its franchises, as security for the payment of an issue of bonds amounting in the aggregate to $3,000,000. That in 1876 there was outstanding about $2,000,000 of said bonds, and that the company had defaulted in its interest. On the 27th day of May, 1876, John I. Blair and other holders of said bonds filed in said court their certain bill for the foreclosure of the said mortgage, and under said bill a receiver was appointed for all the property of said company. On the 12th day of February, 1879, a decree of foreclosure was

entered, and on the 1st day of May, 1879—under and by direction of said decree—all of the property and franchises of said company were sold for the sum of $916,100.

The bill further charges that on or about the 1st day of April, 1880, the Chicago and Pacific company entered into an agreement with the Chicago, Milwaukee and St. Paul company, under and by the terms of which said last-named company undertook to advance the necessary amount for the redemption of said property from the sale under the decree; that, in consideration of such advances, the Chicago and Pacific company agreed to execute to the St. Paul company a lease of all its property and franchises, and also to execute a new mortgage upon all its property as security for the payment of bonds to be issued of a sufficient amount to meet the cost of redemption and the completion and equipment of said road as authorized by its charter. At a special meeting of the stockholders of said Chicago and Pacific company, the execution of said lease and mortgage was duly authorized, and, in pursuance of such authority, on the 1st day of April, 1880, said mortgage was duly executed as security for the payment of a series of bonds, amounting in the aggregate to $3,000,000, and the lease was also, at said date, formally executed. Thereupon the Chicago and Pacific company, with the moneys so advanced, redeemed its property from sale under such foreclosure decree, and afterwards completed its entire road and thoroughly equipped the same. Subsequently the Chicago, Milwaukee and St. Paul company constructed a line of road through the State of Iowa, and, by a bridge across the Mississippi river, formed a continuous line from Chicago to the city of Omaha.

The bill further charges that on the third day of April, 1882, the appellee recovered a judgment in said court against the said Chicago and Pacific Railroad Company for the sum of $36,165 36, and caused a writ of *fieri facias* to be issued thereon, and also directed the marshal of said district to levy said writ upon all the property and appurtenances of said company situate in the State of Illinois, public notice to be given that the same would be sold on the 24th day of October, A. D. 1882. The prayer of the bill was for an injunction restraining the marshal from such sale and from further procedure under said writ.

On the 23d of October, 1882, the parties, by their solicitors, appeared in court, and thereupon complainants moved the court for an injunction as prayed in said bill. After hearing and argument, the court, by its order entered in said cause, restrained the defendant from further proceeding under said writ until the further order of court in said cause; and with leave to the defendant to move, after the expiration of twenty days, to modify or dissolve the injunction.

On the 23d day of October, 1881, Huntington W. Jackson, attorney and receiver of the Third National Bank of Chicago, filed his affidavit in said cause, but, as this affidavit is not evidence, no abstract of its contents is made.

On the 11th day of December, 1882, the Third National Bank of Chicago filed its answer to said bill of complaint, admitting substantially all the charges contained in said bill.

The answer further alleges that on the 9th day of March, A. D. 1886, Horace Tabor recovered in said court

a judgment against Thomas S. Dobbins, George S. Bowen, John S. Wilcox and the Chicago and Pacific Railroad Company for the sum of $3,499.73 damages and $27.05 costs of suit. And that on the 25th day of June, A. D. 1881, by virtue of a writ of *fieri facias* issued thereon, the United States marshal for the Northern district of Illinois, sold all and singular the road and property of the Chicago and Pacific Railroad Company in the State of Illinois, to one Albert Keep.

That on the 25th day of September, A. D. 1882, the Third National Bank of Chicago, in accordance with the statutes of said state, upon the payment of $5,304.20, redeemed said property from said sale.

The defendant further avers that by virtue of such redemption the judgment in favor of the Third National Bank against said railroad company became a valid and subsisting lien upon the property of said company, as against the complainants or either of them in this cause.

The answer further alleges that subsequent to the redemption by said Third National Bank, and prior to the filing of the bill of complaint herein, Alexander Mitchell, to whom the certificate of sale issued by the United States marshal to Albert Keep had been assigned, executed a receipt, by his attorney, E. Walker, to the United States marshal for the redemption money so paid by the Third National Bank. Also that Alexander Mitchell is president of the Chicago, Milwaukee and St. Paul Railway Company, and E. Walker is president of the Chicago and Pacific Railroad Company. The answer charges that Mitchell, in taking the assignment of said certificate from Keep, and receipting for and accepting said redemption money, did so in the interest and

with the knowledge and consent of the said Chicago and Pacific Railroad Company.

Afterwards, and on the 15th day of January, 1883, by leave of court the said defendant filed its cross-bill in said cause. This cross-bill recites the recovery of the judgment by the Third National Bank, of April, 1882, for the sum of $36,165.36, and $36.20 costs of suit; and also the Tabor judgment for the sum of $3,499.73, and $27.05, costs of suit. It also charges that at the time of the recovery of the said last named judgment, the Chicago and Pacific Railroad Company was possessed of and was the owner of its railroad extending from Chicago to Byron, a distance of eighty-eight miles, and that such judgment was a lien upon said railroad and all the property of said company. It also charges the sale of the property under execution issued upon the Tabor judgment, and its purchase by Keep, as recited in the answer to the original bill.

The cross bill also charges the purchase of the certificate of sale by Alexander Mitchell, and the redemption by the Third National Bank.

It is charged that after the rendition of the Tabor judgment, the Chicago and Pacific company executed a lease of its property to the Chicago, Milwaukee and St. Paul company, and that a joint trust deed was executed by both companies to secure an issue of bonds amounting to the sum of $3,000,000.

The only relief prayed is that the judgment in favor of the Third National Bank, together with the amount paid for the redemption from the sale to Albert Keep, "may "be decreed to be a valid and subsisting lien, created in "favor of said Third National Bank, upon all the prop-

"erty of the said Chicago and Pacific Railroad Com-
"pany"; and that "the court should decree that the same
"creates an equitable lien, and encumbrance upon the
"property of the said Chicago and Pacific Railroad Com-
"pany"; and also that a receiver of said property may be appointed according to the course and practice, with the usual powers of receivers in like cases. That such re-
"ceiver may be let into and take possession of said Chicago
"and Pacific Railroad Company, with all its property,
"depot grounds, fixtures and appurtenances, and all the
"rents, issues and profits thereof; that he may have
"power to operate and manage the said road; that he
"may have power to apply the revenues and all the rents,
"issues and profits thereof to the payment of your
"orator's said judgment and the amount of redemption
"money, interest and costs thereon, paid by it under said
"sale to Albert Keep"; also that the said Chicago and Pacific railroad might be decreed to be so'd with its franchises, property, fixtures and appurtenances, under the order and direction of the court, and that out of the proceeds thereof, the cross-complainant might have satisfaction of its said judgment and the amount paid by it for redemption.

To the cross-bill the original complainants, and also the Farmers Loan and Trust Company, trustees under the joint mortgage issued by the original complainants, were made defendants.

Thereafter, the railroad companies, defendants to the cross-bill, filed their demurrer, which was overruled by the court on the 15th day of March, 1883, with leave to answer said cross-bill. The answer to the cross-bill admits the recovery of the judgment by the Third National Bank, and also of the Tabor judgment.

Said answer further admits the foreclosure of the mortgage and sale of the property, and charges that the amount realized out of said sale was more than $500,000, less than the amount of such decree; and that deficiency decrees were entered therefor in favor of the holders of said mortgage bonds.

Said defendants to the cross-bill also charge that they had no knowledge of the purchase of said certificates of sale by said Alexander Mitchell, and deny that said purchase, if made, was in the interest of said Chicago and Pacific Railroad Company, or that said railroad company was benefited thereby, or had any interest therein.

The cross-cause was referred to the master with directions to hear and report the evidence. The report was filed on the 26th day of June, 1884.

By the master's report it appears that a decree of foreclosure was entered against the Chicago and Pacific Railroad Company in the case of Blair and others, and that the property and franchises of the company were sold in accordance with the terms of such decree, as charged in appellant's answer to the cross-bill.

That for the purpose of providing means for the redemption of the property so sold, and for the proper completion and equipment of the road, a new trust deed was executed as security for the issue of new bonds, amounting in the aggregate to the sum of $3,000,000, and a lease also executed by the Chicago and Pacific company to the Chicago, Milwaukee and St. Paul company.

The $3,000,000 of bonds were sold at a little less than their par value.

On or about the first day of April, 1880, the Chicago

and Pacific company redeemed its property from the sale made by the marshal in pursuance of the decree. And thereupon the Chicago, Milwaukee and St. Paul company entered into possession of all the property of the Chicago and Pacific company under said lease, and has continued in possession of the same until the present time.

At the time of the foreclosure proceedings and the execution of the lease and the delivery of possession to the Chicago, Milwaukee and St. Paul Railroad Company, the road had been partially constructed for a distance of about eighty-nine miles west of the city of Chicago. At the time of the sale of the property the company owned but a small amount of rolling-stock, and had not sufficient terminal facilities, stations or station grounds. Additional terminal facilities were purchased and right of way secured, the title running to the Chicago and Pacific company.

It also appears from the evidence that the Chicago and Pacific company had no property of any kind or character, other than that conveyed to the trustees under the mortgages of 1880 and in the possession of the Chicago, Milwaukee and St. Paul company, under its lease.

It also appears that the defendants to the cross-bill at the hearing before the master, tendered payment of the full amount due upon the Tabor judgment, referred to in the cross-bill.

It further appears from the evidence that the full amount of the proceeds of the three million dollars of bonds was applied to the redemption of the road from sale, and the purchase of additional property for terminal facilities, stations, and station buildings; the extension and

thorough completion of the road to the Mississippi river, and to the payment and discharge of deficiency decrees under the original foreclosure proceedings and other judgment liens, upon the property, existing at the time of the execution of the trust deed of April, 1880.

The deficiency decrees were in favor of the holders of the first mortgage bonds that had been hypothecated by the company as security for loans and personal indebtedness, and that among other deficiency decrees, the company was required to pay about eighty thousand dollars to the holders of the bonds that were hypothecated with the Third National Bank as security for its loan to the company, upon which its judgment was entered.

It also is in evidence that Alexander Mitchell was president of the Chicago, Milwaukee and St. Paul Railroad Company, but that he did not, as such president, redeem the property from Albert Keep on the execution sale.

Also that E. Walker was president of the Chicago and Pacific company as well as attorney for the Chicago, Milwaukee and St. Paul company, but that he did not receive such money from the marshal either as attorney for the one or president of the other company.

A copy of the resolutions adopted at a special meeting of the stockholders of the Chicago and Pacific company, authorizing the execution of the trust deed of 1880, and the lease to the Chicago, Milwaukee and St. Paul Railroad Company, was in evidence.

These resolutions, among other matters, recite the execution of the original mortgage of 1876, and the issue of the bonds thereunder; the indebtedness of the company and the hypothecation of about two millions of such bonds to secure such indebtedness; the default of the company

in payment of such interest; the foreclosure proceedings and the sale of the property under the decree of court for the sum of $916,100.

Also that certain other parties to whom said company was indebted had prosecuted their several demands in certain courts of the State of Illinois, and had procured divers judgments thereon, which remained unpaid and unsatisfied of record, and were a lien upon the property of said company.

The resolutions further recite that,

"WHEREAS, the Chicago, Milwaukee and St. Paul "Railroad Company, at the request of this company, now "proposes to aid the party of the first part in securing a "sufficient sum of money to redeem said property from "the aforesaid sale, and to protect said property from all "of the aforesaid valid judgment liens, and also to extend "and construct said road to the Mississippi river, and to "procure necessary terminal facilities, depots and station "grounds; to relay the track, already constructed, with "steel rails, and fully equip said road, estimating the en- "tire aggregate cost at $3,000,000, for which said sum "the Chicago, Milwaukee and St. Paul Railway Com- "pany, by its proper officers, proposes to execute, with "the Chicago and Pacific company, their joint and sev- "eral bonds of $1,000 each, bearing date the 2d day of "April, 1880, and becoming due and payable on the 1st "day of January, A. D. 1910, with interest, to be secured "by a trust deed or mortgage, of even date with said "bonds, conveying all of the railroad, franchises and "other property of the said Chicago and Pacific com- "pany to the Farmers Loan and Trust Company, of the "city of New York."

The resolutions further recite that the Chicago, Milwaukee and St. Paul Railroad Company proposes to take up, pay and concel all said bonds at maturity, and to meet, pay and satisfy all the accruing interest on said bonds, to pay all taxes, charges and assessments imposed or assessed upon the property of said Chicago and Pacific Company.

Said resolutions further recite that,

"WHEREAS, the said Chicago and Pacific Railroad "Company has no means or resources out of which the "necessary amount of money can be realized or provided "for the redemption of its property and franchises from "said sale under said decree, and for the discharge ol "said judgment liens and completion of its railroad as "hereinbefore recited, and no pecuniary credit or ability "to provide for the same, except by the aforesaid lease "to the said Chicago, Milwaukee and St. Paul Railway "Company, and the execution of said mortgage or trust "deed, together with the bonds to be secured thereby as "hereinbefore recited.

"NOW, THEREFORE, be it resolved, that the Chicago "and Pacific Railroad Company, in consideration of the "premises, shall grant, demise and lease unto the Chicago, "Milwaukee and St. Paul company all and singular its "railroad," etc.

By the resolutions the president and secretary of the company were directed and authorized to execute in the name of the company the lease, bonds and mortgage, alf of which was formally done early in April, 1880.

The evidence also discloses that on the 2d day of June, 1881, there was issued a writ of *fieri facias* out of the Circuit court of the United States, for the Northern dis-

trict of Illinois, upon the judgment renderrd in said court on the 9th day of March, A. D. 1876, for the sum of $3,499.73 damages and $27.05 costs of suit, in a case wherein Horace Tabor was plaintiff and Thomas S. Dobbins, George S. Bowen, John S. Wilcox and the Chicago and Pacific Railroad Company were defendants.

This writ was levied upon the property of the Chicago and Pacific company, and by virtue of such writ said property was sold by the marshal of said court on the 25th day of June, 1881, to Albert Keep for the sum of $4,822.

The property so sold is described as follows: "All "and singular the railroad of the Chicago and Pacific "Railroad Company, as the same is now surveyed, laid "out, constructed and located in the counties of Cook, "DuPage, Kane, DeKalb, Ogle, and Carrol, in the State "of Illinois, including the road-bed, stations, or station-"houses, depot grounds, rails, ties, fences, bridges, via-"ducts, and culverts, and all other buildings and struct-"ures, as well as engine-houses, machine and other "shops used in connection with said railroad."

The marshal made further return that unless said premises shall be redeemed from the sale within fifteen months from the date hereof, according to law, the said Albert Keep will be entitled to a deed of the property so purchased by him.

On the 24th day of June, 1882, the said Albert Keep made a written assignment of such certificate to Alexander Mitchell of Milwaukee, receiving therefor the sum of $5,206 76.

On the back of said certificate was the following endorsement, to wit: Marshal's certificate of sale to Albert Keep. *Horace Tabor* v. *Thomas S. Dobbins et al.*

Redeemed, September 25, 1882. Marshal's costs $92.50; paid July 16, 1881.

On the 25th day of September, A. D. 1882, the marshal executed a formal certificate of redemption wherein he recited that the "Third National Bank of Chicago has "this day, by the payment of the sum of $5,304.20, re-"deemed said property from the sale made by him under "writs issued out of the Circuit court of the United States "for the Northern district of Illinois, upon the judgment "of the said Horace Tabor."

It further appears from the evidence that the clerk of said Circuit court issued and delivered to said marshal on the 15th day of July, A. D. 1882, a certain writ of *fieri facias*, commanding that of the goods and chattels, lands and tenements, of the Chicago and Pacific Railroad Company, be caused to be made the sum of $36,200.96, being the amount of the judgment of the Third National Bank against the said Chicago and Pacific Railroad Company.

On the 25th day of September, 1882, this writ was levied upon all the property of every kind and character of said railroad company situate in the State of Illinois.

On the 24th of October, 1882, the marshall returned this writ with the following endorsement: "I hereby "return this writ without sale of property, wholly un-"satisfied—having been enjoined from making a sale by "the United States Circuit court."

The lease hereinbefore referred to was also in evidence.

The resolutions adopted by the stockholders of the Chicago and Pacific company are made a part of the lease, and precede the covenants of the Chicago, Milwaukee and St. Paul Railroad Company.

Under article 1 of the lease, the lessee covenants to cancel, satisfy and discharge the three thousand bonds at the maturity thereof, and to pay, cancel and discharge all of the coupons or interest warrants attached to said bonds, and to save the lessor harmless therefrom.

Under article 2, the lessee covenants to operate the road in the same manner as the lessor would be required under the law, and to keep and preserve said railway, premises, and every part thereof, in thorough repair and working order and condition, and to satisfy all taxes that might be levied upon the premises, either by the State or National governments.

Under article 3, the lessee covenants to restore said property to the lessor at the expiration of the lease, with all additions, betterments and improvements.

This lease was duly acknowledged by the proper officers of the respective parties, and recorded in the various counties upon the line of road.

On the 24th of November, 1885, the cause came on for hearing upon the pleadings and proofs, and upon the same day the cross-complainant asked leave of court to amend its cross-bill so as to conform to the testimony in the record, but, upon objections by the cross-defendants, the court took the matter under advisement, and on the following day the hearing of said cause was concluded.

The record further discloses that on the first day of February, 1886, the parties again appeared by their respective counsel for the purpose of settling the decree in accordance with the finding of the court theretofore rendered; and thereupon the cross-complainant by its counsel withdrew its motion for leave to amend its cross-bill, and the further hearing of the cause upon the cross-

complainant's objection to the draft of the decree was postponed.

And thereupon the appellant filed the following objections to the draft of decree, to wit:

1st. Said draft of decree does not correctly recite the provisions and conditions of said lease executed by the Chicago and Pacific Railroad Company to this cross-defendant.

2d. The finding of the court "that said bonds were "sold and the proceeds, amounting to nearly three mil-"lion of dollars, were received by the Chicago, Milwaukee "and St. Paul Railway Company," is not sustained by the proofs in said cause.

3d. The finding by the court that "The Chicago, "Milwaukee and St. Paul Railway Company constructed "a bridge across the said Mississippi river with the pro-"ceeds of said bonds," is not supported by the proof and is not authorized by the original cross-bill and answer and the issues tendered thereunder.

4th. Said draft of decree does not conform to the allegations in the pleadings, nor the proofs in said cause. Neither the pleadings nor the proof authorize a personal decree against this cross-defendant.

On the first day of March, 1886, the parties again appeared in court, and thereupon the cross-complainant, and by leave of court, over the objections of appellant, filed its amended cross-bill.

The amendments charge that the Chicago and Pacific Railroad Company executed to the Chicago, Milwaukee and St. Paul Railway Company on the 2d day of April, A. D. 1880, a lease of its railroad and all its property for a term of 999 years; and that about the same date both

companies joined in the execution of a trust deed upon all the property of the first named company to the Farmers Loan and Trust Company to secure the issue of a series of bonds, amounting to the snm $3,000,000, and that said bonds were sold, and that the proceeds, amounting to nearly the sum of $3,000,000 were received by the Chicago, Milwaukee and St. Paul Railway Company.

That in said lease, no rentals whatever were received or to be paid for the property of said Chicago and Pacific company for said term of years; and that the consideration for the making of said lease was that the lessee should aid the lessor company in procuring a sufficient sum of money to redeem the property from the sale under the foreclosure decree; to pay all judgments and demands against the Chicago and Pacific company and to extend and construct its road to the Mississippi river; to secure all proper and necessary terminal facilities and depot grounds, along the line; to relay that part of the road then constructed with steel rails and to fully equip the road with all necessary rolling stock, so as to make the entire line a first-class railroad in all respects, the entire cost of which was estimated at $3,000,000.

That the lessee redeemed such property from the foreclosure sale and completed said road to the Mississippi river, and took possession thereof, and has ever since been in the enjoyment and use of said railroad and property, but has wholly failed and neglected to pay out of the proceeds of said bonds, or in any other way, the judgment of said Horace Tabor, and the demand of said cross-complainant, now in judgment.

That instead of applying enough of the proceeds of the said bonds to pay and satisfy such claims, the Chi-

cago, Milwaukee and St. Paul Railroad Company used a large portion of the proceeds of said bonds in building a bridge across the Mississippi river, and thereby misapplied a large portion of the proceeds of said bonds, and used the same for another purpose than that for which said bonds were issued.

The amendment further charges and "asserts that by "the arrangement between the said companies, and by its "acceptance of said lease, and the use and enjoyment of "said property and by the receipt of the proceeds of said "bonds, the said Chicago, Milwaukee and St. Paul Com- "pany was bound in law and equity to apply enough of "the proceeds of said bonds to pay and satisfy the said "judgment in favor of said Horace Tabor, and the demand "of your orator, and was bound to pay to your orator the "amount of money paid upon the redemption of said prop- "erty from the sale under said Tabor judgment, with "interest, and the amount of back judgment in favor of "your orator, with interest, and costs of suit."

Also that the prayer for general relief in the cross-bill be amended as follows: "Or that the said Chicago, Mil- "waukee and St. Paul Railway Company may be decreed "to pay to your orator the amount paid by your orator "upon the redemption of the property of the Chicago "and Pacific Railroad Company from the sale made on "execution issued on the judgment of Horace Tabor, "with interest and costs, and the amount of said judg- "ment recovered by your orator against the said Chi- "cago and Pacific Railroad Company with interest and "costs, by a short day to be specified in said decree."

On the 15th day of February, 1886, the court entered its final decree in the original cause, enjoining the said Huntington W. Jackson, receiver, and the Third National

Bank of Chicago, their successors and assigns, etc., from further proceeding under the writ of *fieri facias*, issued out of said court on the 15th day of July, 1882, upon the judgment recovered in said court by said Third National Bank of Chicago; also that the marshal be perpetually enjoined and restrained from selling under the levy of said writ, and that said levy be released.

Thereupon the appellant, the Chicago, Milwaukee and St. Paul Railway Company, prayed leave of court to file its separate answer to the amended cross-bill. The appellant's motion was denied by the court, but the answer is made a part of the record of this cause.

Said answer admits the execution of the joint trust deed and bonds, and the sale of said bonds by said cross-defendant by authority of the said Chicago and Pacific Railroad Company.

The answer further avers that all the covenants assumed by said cross-defendant are set forth in said lease; and further avers that said cross-defendant has never assumed any covenants or obligations other than those contained in said lease.

The answer also denies that said cross-defendant ever assumed, or undertook, or became obligated to pay or discharge either of said claims, demands, or judgments, of the said Tabor or of the said cross-complainant.

The answer further charges that said cross-complainant advanced said Chicago and Pacific company, for the redemption of its said property from sale under the foreclosure decree, and the payment of costs and expenses connected therewith, about the sum of $1,100,000. Also that it had been compelled to pay, satisfy, and discharge, the deficiency decrees theretofore entered by said court

in said foreclosure proceedings, amounting to about the sum of $400,000. Also that it has paid and discharged a large number of judgment liens existing and in full force at the time of the execution of the said lease, amounting to the sum of about $200,000. Also that the aggregate amount expended by said cross-defendant in and about the matters hereinbefore referred to, amounted to the sum of $4,000,000.

And "especially denies that it ever diverted any part "of the proceeds of the said mortgage bonds from the "intended purpose and use as alleged in the said cross-"bill; and especially denies that said cross-complainant "has any just claim or demand, either in law or in equity, "against this respondent."

The appellant's exceptions to the draft of decree were overruled, and such decree was enrolled on the 1st day of March, A. D. 1886.

The decree finds that the Chicago and Pacific company was organized in 1865 by a special act of the legislature, with authority to construct a road from the city of Chicago to the Mississippi river. Also finds that on the first day of October, 1872, it executed a trust deed to secure an issue of bonds amounting to $3,000,000; that foreclosure proceedings were commenced in May, 1876, in the United States court for the Northern district of Illinois, and that, in May, 1879, the property and franchises of said company were sold subject to redemption under the decree previously rendered in said foreclosure suit of Blair and others, for the sum of $916,100; also that on the 2d day of April, 1880, the company, with the approval of its stockholders, executed a lease of its railroad and other property to the Chicago, Milwaukee and St.

Paul Railway Company for a term of nine hundred and ninety-nine years—and that

"In and by which lease it was, among other things, provided that,

"Whereas, certain other parties to whom the Chicago and "Pacific Railroad Company was so as aforesaid indebted, "have prosecuted their certain demands in the Superior "and Circuit courts of Cook county and other courts in "the State of Illinois, and have procured divers judg- "ments thereon, which now remain unpaid and unsatis- "fied of record and

"Whereas, the Chicago, Milwaukee and St. Paul Rail- "way Company, at the request of the Chicago and Pacific "Railroad Company, now proposes to aid the said Chi- "cago and Pacific Railroad Company in procuring a suffi- "cient sum of money to redeem said property from the "aforesaid sale, and to protect said property from all of "the said valid judgment liens; and also to construct the "railroad of the said Chicago and Pacific Railroad Com- "pany to the Mississippi river, and secure all proper and "necessary terminal facilities," etc., etc.

The decree further finds the execution and issue and sale of the $3,000,000 of bonds secured by the trust deed of April, 1880; the execution of the lease and the entry into the possession of the property therein described by the Chicago, Milwaukee and St. Paul company.

And further finds as follows:

"And it further appearing to the court that the Chica- "go, Milwaukee and St. Paul Railway Company extended "the road of the Chicago and Pacific Railroad Company "to the Mississippi river at Savannah, where it, the Chi- "cago, Milwaukee and St. Paul Railway Company con-

"structed a bridge across said Mississippi river with the "proceeds of said bonds, and has ever since operated the "road as a part of its line between Chicago and Omaha."

Also the recovery of the Tabor judgment and sale by the marshal; the purchase by Albert Keep; the redemption of the property by the Third National Bank, and also the recovery by the said Third National Bank on the 3d day of April, 1882, of the judgment against the Chicago and Pacific Railroad Company for the sum of $36,165.36 and $36.20 costs of suit.

And thereupon the court decrees as follows:

"And it appearing to the court that the complainant in "the cross-bill and its amendments, is entitled to relief;

"Now, therefore, be it ordered, adjudged and decreed, "that the Chicago, Milwaukee and St. Paul Railway "Company pay in to the clerk of this court, within thirty "days, a sum of money sufficient to satisfy the judgment, "costs and interest rendered in favor of the Third Na- "tional Bank of Chicago against The Chicago and Pa- "cific Railroad Company, including also the amount, with "interest, paid by the Third National Bank of Chicago "to the United States marshal for the Northern district "of Illinois, to redeem from the sale to Albert Keep as "aforesaid; and it is further ordered, adjudged and de- "creed, that in case the Chicago, Milwaukee and St. Paul "Railway Company shall fail to pay said sum of money "aforesaid within said thirty days, the Third National "Bank of Chicago may move the court for the appoint- "ment of a receiver, with the usual power of receivers, "to take possession of the said leased property and to "operate it until the amount due to the said Third Na- "tional Bank of Chicago upon its judgment as aforesaid, "with costs and interest thereon, and the amount, with

"interest thereon so paid by the Third National Bank of "Chicago to the United States marshal for the Northern "district of Illinois, to redeem from said sale to Albert "Keep is paid out of the earnings of said road, and for "any other proper relief.

"It is further ordered, that the complainant in the "cross-bill recover its costs of the defendant in said cross-"bill, The Chicago, Milwaukee and St. Paul Railway "Company, to be taxed.

"And thereupon the cross-defendant, the Chicago, Mil-"waukee and St. Paul Railway Company, prays an ap-"peal from the decree entered in said cross cause to the "Supreme court, which the court allows upon the filing "of a bond, with surety to be approved by the court, in "the sum of $10,000, which bond shall operate as a "supersedeas."

Assignment of Errors.

1. The court erred in permitting the cross-bill to be filed, as it is not germane to the original bill.

2. The court erred in overruling complainant's demurrer to the cross-bill.

3. The court erred in permitting the amendment to the cross-bill after the hearing, and in founding the decree thereon, as the amendment was not germane to either the original bill or the cross-bill as originally filed, and by the introduction of new and distinct issues and an additional and an entirely new prayer for relief, introduced into the causes issues and not contemplated by or within the scope of the original suit.

4. The court erred in permitting the cross-bill to

stand as amended, for as amended it was not germane to the original bill.

5. The court erred in refusing to permit appellant to file answer denying the new, distinct and altogether surprising charges contained in the amendment to the cross-bill.

6. The findings of the court and the decree are not supported by the evidence.

7. There are other and manifest errors in the record.

BRIEF.

I.

THE CROSS BILL IS NOT GERMANE TO THE ORIGINAL BILL, AND THE COURT ERRED IN PERMITTING IT TO BE FILED, AND IN OVERRULING THE PLAINTIFF'S DEMURRER THERETO.

1. A cross-bill is a bill brought by a defendant in a suit against the plaintiff in the same suit, or against other defendants in the same suit, or against both, touching the matters in question in the original bill. It is usually brought either (1) to obtain a necessary discovery of facts in aid of the defense of the original bill, or (2) to obtain full relief to all parties *touching the matters of the original bill.*

Story Eq. Pl., Sec. 389.
Young v. *Colt*, 2 Blatch., 273.

2. A cross-bill is a matter of defense, and is confined

to the matters in litigation in the original suit. If it brings before the court other distinct matters and rights it is no longer entitled to be deemed a cross-bill, but is an original suit and no decree, founded upon such matters, would be made upon the hearing of the cause.

Story Eq. Pl., Secs. 393, 631.
Gallatin v. *Erwin*, 8 Cowen, 361.
Walden v. *Bodley*, 14 Peters, 156.

3. It is treated as an auxiliary suit, or as a dependency upon the original suit.

Slason v. *Wright*, 14 Vt., 208.
Cross v. *De Valle*, 1 Wallace, 5.

4. And can be sustained only on matters growing out of the original bill.

Thompson v. *Shoemaker*, 68 Ill., 256.
Lund v. *Skanes Bank*, 96 Ill., 181.
Gage v. *Mayer*, 117 Ill., 632.
Daniel v. *Morrison*, 6 Dana, 186.
Crabtree v. *Banks*, 1 Met. (Ky.), 482.
Slason v. *Wright*, 14 Vt., 208.
Rutland v. *Page*, 24 Vt., 181.
Ayers v. *Carver*, 17 How., 591.
Pendall v. *Trevor*, 30 Ark., 249.
Eve v. *Louis*, 91 Ind., 470.
Hall Lumber Co. v. *Gustin*, 54 Mich., 524.
Cartwright v. *Clark*, 4 Met., 104.
Kemp v. *Mackrell*, 3 Atk., 812.
Cross v. *De Valle*, 1 Wall., 5.
Rubber Co. v. *Goodyear*, 9 Wallace, 807.
Mayflower v. *The Dove*, 91 U. S., 379, 385.

5. No decree can be founded upon new and distinct matters introduced by a cross-bill which were not embraced in the original suit.

Daniels Chn. Practice, page 1,549, note 2.
May v. *Armstrong*, 3 J. J. Marsh, 262.
Daniels v. *Morrison*, 6 Dana, 186.
Gallatin v. *Erwin*, 3 Cowen, 361.
Field v. *Schieffelne*, 7 John. Ch., 252.
Josey v. *Rodgers*, 13 Geo., 478.
Andrews v. *Hobson*, 23 Ala., 219.
Gouverneure v. *Elmendorf*, 4 John. Ch., 357.
Griffith v. *Merritt*, 19 N. Y., 529.

II.

THE AMENDMENT TO THE CROSS-BILL FILED BY LEAVE OF THE COURT AFTER THE HEARING, AND TO SUPPORT THE DECREE, WAS NOT GERMANE EITHER TO THE ORIGINAL BILL OR THE CROSS-BILL, AS ORIGINALLY FILED, AND, BY THE INTRODUCTION OF NEW AND DISTINCT CHARGES AND AN ADDITIONAL AND ENTIRELY NEW PRAYER FOR RELIEF, INTRODUCED INTO THE CAUSE ISSUES NOT CONTEMPLATED IN EITHER THE ORIGINAL BILL OR THE ORIGINAL CROSS-BILL, AND THE ANSWERS FILED THERETO, AND THE COURT THEREFORE ERRED IN PERMITTING THE AMENDMENT TO BE FILED AND IN FOUNDING ITS DECREE THEREON.

1. An amendment will not be allowed at hearing, and much less, after case is heard, which contains anything that will prejudice or surprise defendant, or that will in anywise change the issues.

Mosier v. *Knox Coll.*, 32 Ill., 155.
Farwell v. *Meyer*, 35 Ill., 40.

Hewitt v. *Dement*, 57 Ill., 500, 502.
Lewis v. *Lanphere*, 79 Ill., 187, 189.
Booth v. *Wiley*, 102 Ill., 84, 100.
Am. Bible Society v. *Price*, 115 Ill., 623–666.
The Tromolo Patent, 23 U. S., 518, 527.
Harding, Admx., v. *Boyd*, 113 U. S., 756.
Shields v. *Barrow*, 17 How., 530.
Snead v. *McCoul*, 12 How., 407, 421, 422.
Oglesby v. *Attrill*, 14 Fed. Rep., 214.
Land Co. v. *Elkins*, 20 Fed. Rep., 545.

2. If the courts below abuse their discretion in permitting amendments at hearing, their action will be reviewed.

Jefferson County v. *Ferguson*, 13 Ill., 33, 35.
Mason v. *Blair*, 33 Ill., 194.
Booth v. *Wiley*, 102 Ill., 84, 100.
Gordan v. *Reynolds*, 114 Ill., 118, 123.

III.

THE CROSS-BILL, AS AMENDED, IS NOT GERMANE TO THE ORIGINAL BILL, AND THE COURT ERRED IN FOUNDING A DECREE UPON IT AS AMENDED.

This proposition is, of course, supported by all the authorities cited under first proposition, and by the authorities cited under first branch of second proposition.

IV.

THE DECREE IS NOT SUPPORTED BY THE EVIDENCE.

ARGUMENT.

I.

THE CROSS-BILL IS NOT GERMANE TO THE ORIGINAL BILL.

The original bill was simply a bill for an injunction to stay the unlawful sale of a railway under an execution. That was all. It did not pray for any decree which in any way involved the defendants' rights. It simply asked that the defendant be restrained from doing an unlawful act. Whatever the defendant could legally do to collect its judgment it could still do. The bill did not call into question the validity of the judgment or deny the defendant's right to collect it by proper means.

The defendant responds with a cross-bill praying that the judgment may be declared a lien on the property and that a receiver may be appointed with the usual powers to manage the road and pay the debt.

What this has to do with the original bill it is difficult to see. It is an entirely new and original proceeding.

The defendant first attempts what it has no right to do, namely, forcibly seize a railroad and sell it on execution, then when it is enjoined from doing that, it attempts to introduce as part of the injunction proceedings, a step it should have taken originally. Clearly the cross-bill was not proper.

As to the nature and object of a cross-bill, the court says in *Ayers* v. *Carver*, 17 How., 591 (s. c. 1 Myers' Fed. Dec., 473), cited before:

"A cross-bill is brought by a defendant in a suit against

the plaintiff in the same suit, or against other defendants in the same suit, or against both, touching the matters in question in the original bill. It is brought either to obtain a discovery of facts, in aid of the defense to the original bill, or to obtain full and complete relief to all parties, as to the matters charged in the original bill. It should not introduce new and distinct matters not embraced in the original bill, as they cannot be properly examined in that suit, but constitute the subject-matter of an original independent suit. The cross-bill is auxiliary to the proceeding in the original suit, and a dependency upon it. It is said by Lord Hardwicke that both the original and cross-bill constitute but one suit, so intimately are they connected together. *Field* v. *Schieffelin*, 7 Johns. Ch. R., 252. The office of a cross-bill has been fully discussed at this term by Mr. Justice Curtis in the case of *Victor Shields et al.* v. *Barrow*, and I need not, therefore pursue it, but refer only to that opinion for the true doctrine on the subject."

In the case of *Young* v. *Colts*, 2 Blatch., 273 (s. c. 15 Myers' Fed. Dec., 802), cited before, the court says:

"The broad principle upon which a cross-bill is allowed is, that equity should give the suitor a common advantage in its processes. As it compels a defendant to make disclosures and discoveries under oath to aid an action against him, so should it secure mutuality in this privilege by allowing a defendant to become a plaintiff and compel his adversary, in particular cases, to make disclosures and discoveries of matters within his knowledge that are serviceable to the defense. The parties, to that end, alternate places, in order that each may have the same use of the powers of the court for the same object. A cross-bill, as its name imports, goes no further than to give the party filing it the reciprocal right enjoyed by the complainant in the original bill, in respect to their mutual title or interest in the subject-matter of the suit. Story's Eq. Pl., Secs. 389, 390."

In *Cross* v. *De Valle*, 1 Wall., 5, cited before, on page 14, the court says: "A cross-bill is a mere auxiliary suit and the dependency of the original. It may be brought

by a defendant against the plaintiff in the same suit, or against other defendants, or against both, but it must be touching the matters in question in the bill; as where a discovery is necessary, or as where the original bill is brought for a specific performance of a contract, which the defendant at the same time insists ought to be delivered up and canceled; or where the matter of defense arises out of the causes at issue, where in cases at law the defense is by plea *puis darrein continuance.* The bill filed by the heirs is for an entirely different purpose from that of Cross, it called upon the court to decree on the future rights of their co-defendants and others not *in esse*, and decree the limitations on the life estate to be void as tending to a perpetuity. This would be introducing an entirely new controversy, not at all necessary to be decided in order to have a final decree on the case presented by the original bill."

And so in the case at bar, the cross-bill is for an entirely different purpose from the original bill. It has no relation to the matters contained in the original bill, it does not pertain to the subject-matter of the original suit; which was simply for an injunction to restrain the commission of an unlawful act.

II.

THE AMENDMENT TO THE CROSS-BILL PERMITTED AFTER HEARING WAS NOT GERMANE TO EITHER THE ORIGINAL BILL OR THE CROSS-BILL.

How exceedingly chary the courts are of permitting amendments after hearing, may be gathered from the following decisions, all cited before in the brief.

In *Harding, Admx., et al.* v. *Boyd*, 113 U. S., 756, the court permitted an amendment to the original bill after the evidence was read. The amendment simply prayed for alternate relief, and consisted of the following words:

"Or, if thought proper, that the court give a decree for "the purchase money due on said lands, and that the "plaintiff be decreed to have a lien on said lands, for the "payment thereof, and that said lien be enforced." The language of the court, on pages 761 to 765, is directly applicable to the case at bar. After citing, with approval, *Lyon* v. *Talmadge*, 1st Johns. Ch., 184, 188, and 1st Dan. Ch. Pr., 384, 5th Ed., the court, by Justice Harlan who rendered the opinion, goes on to say that the original bill certainly stated facts entitling the complainants to some relief, and that the complainants evidently supposed that the relief to which they were entitled was a cancellation of certain bonds and deeds. But while the evidence did not clearly show that the complainants were entitled to a cancellation, it did show conclusively that the purchaser had not fully paid for the lands according to the terms of his purchase, and the amendment simply prayed the alternate relief that the court give a decree for the purchase money due on said lands, and it further appeared that when leave was asked to amend the prayer for relief, no objection was made by the defendant, "but "the amendment having been allowed, he excepted, but "without any suggestion of surprise, or any intimation "that he was able to or desired to produce additional "proof upon the issue."

And right here we respectfully call the court's attention to the fact that in the case at bar, the defendant to cross-bill not only strenuously objected to the amendment of the cross-bill, but asked leave of the court to file an answer denying the charges set forth in the amendment and setting up a complete defense to the cross-bill as amended, which leave was not granted, and the defendant to the cross-bill was wholly debarred from all right to

show that the charges in the amendment were wholly without foundation.

Of the amendment in the case cited, Justice HARLAN says, on page 763: "*It suggested no change or modification of its allegations, and in no just sense made a new case.*"

On page 764, he cites, with approval, the decisions in *Shields* v. *Barrow*, 17 How., 130, cited before, and distinguishes that case from the one under consideration, saying:

"The circumstances of the present case are entirely different from those in *Shields* v. *Barrow*. *The amendment here did not introduce new allegations, nor make additional parties, nor encumber the record, nor increase the expenses of the litigation, nor complicate the suit, nor make new issues of fact. It simply enabled the court, upon the case made by the original bill, to give the relief which that case justified.*"

Applying the language of justice Harlan to the case at bar, it becomes at once apparent that the amendment permitted by the court below did introduce new allegations and made new issues of fact and was wholly foreign to the issues made by the original bill and the original cross-bill and the answers thereto.

In the Tremolo patent, 23 U. S., 518, amendment to the bill was allowed, after final decree had been made, to make the bill conform to the proof.

Concerning the amendment, Mr. Justice STRONG, who delivered the opinion of the court, says, on page 527: "We think that the order of the court directing that the record be amended by inserting in the bill an averment of the second re-issue was properly made, under the circumstances of the case, though made after the final decree. For, practically, the rights of the complainants under the second re-issue, and the defendant's infringement thereof, were in issue under the answer and replica-

tion. *The amendment deprived the defendants of no rights which they had not enjoyed during all the progress of the trial. It may well be denominated only an amendment of form, because it introduced no other cause of action than that which had been tried. It is true that an amendment which changes the character of the bill ought not generally to be allowed after a case has been set for a hearing,* AND STILL LESS AFTER IT HAS BEEN HEARD. *The reason is that the answer may become inapplicable if such an amendment be permitted.* But in this case the defendants were not prejudiced. They had every advantage they could have had if the bill had originally averred the second re-issue. The case is undoubtedly anomalous, but we think justice would not be subserved by denying to the Circuit court the power to order such an amendment as was made after the cause was tried, precisely as it must have been tried if the bill had originally contained the averment inserted by the amendment."

In *Shields* v. *Barrow*, 17 How., 530, on page 144, court says of the amendment that had been allowed in the court below:

"Nor is the complainant at liberty to abandon the entire case made by his bill, and make a new and different case by way of amendment. We apprehend the true rule on this subject is laid down by the vice-chancellor in *Verplanck* v. *The Mercantile Ins. Co.*, 1 Edwards Ch. R., 46. Under the privilege of amending a party is not to be permitted to make a new bill. Amendments can only be allowed when the bill is found defective in proper parties, in its prayer for relief, or in the omission or mistake of some fact or circumstance connected with the substance of the case, *but not forming the substance itself, or for putting in issue new matter to meet allegations in the answer.*"

"To strike out the entire substance and prayer of a bill, and insert a new case by way of amendment leaves the record unnecessarily incumbered with the original proceedings, increases expenses and complicates the suit: it is far better to require the complainant to begin anew."

If this is true before hearing and proofs, when defendant can answer, how much more applicable is it after hearing when defendant can neither answer nor put in proofs to rebut the new case made.

The court goes on to say:

"To insert a wholly different case is not properly an amendment, and should not be condemned within the rules on that only act."

In *Snead* v. *McCoul*, 12 How., 407, leave to amend was refused, the court saying on pages 421, 422.

"After this cause had been heard in argument and taken under advisement by the Circuit court, the plaintiff petitioned that court to permit him to file a farther bill, by way of amendment and supplement to the original bill and bill of revivor previously filed in the cause; and after being heard by counsel upon his petition, the court refused to grant the prayer thereof, on the grounds that the application was made at too late a period, and that the changes proposed by the plaintiff in the character of the cause would have been in reality the presenting of an entirely new case, rather than an amendment of the original bill. This refusal of the Circuit court we hold to have been sound in principle; and it is sustained by the express language and authority of this court in the case of *Walden* v. *Bradley*, which declares that although there are cases where amendments may be permitted at any stage of the proceedings in the cause, as where an essential party has been omitted; yet amendments which change the character of the bill or answer, so as to make substantially a new case, should rarely, if ever, be admitted after the cause is set for hearing, much less after it has been heard. *Vide* 14 Peters, 156. Moreover, a fact which imparts greater force to the refusal of the Circuit court to permit amendment at so late a stage of the proceedings is this, that the application to that court appears to have been accompanied with no evidence and not even by an affidavit, to show that the amendments desired would not have been made portions of the original bill; on the contrary it is

manifest, that they might have formed a part of the case as originally presented to the Circuit court, if at any time it were proper to incorporate them with the subject-matter and with the objects proposed by the original bill. The prayer of the original bill was limited to the enforcement of an alleged judgment lien upon specific property purchased by the defendant, Selden, and to recourse against the heirs and widow of McCoull, of whom Selden had purchased; the proposed change, by way of amendment and supplement, is a general bill for discovery and relief against all persons alleged or supposed to have been purchasers or grantees from McCoull, and for satisfaction out of the property purchased by him, or to which he had title at the date of the original judgment in favor of Leekamp. Such an essential change in the character and objects of the cause proposed, too, after a hearing, and when it was manifest that the object of the original bill - namely, the lien of the judgment, no longer existed, could not have been accorded the plaintiff by any sound rule of practice."

It would be difficult to find language more forcible and pertinent to the case at bar.

In *Jefferson County* v. *Ferguson*, 14 Illinois, 33, on page 35, Justice CATON says of amendments: "Four amendments were allowed to this bill, two of which were permitted after the case had been argued, and while it was under advisement in the court below. The permitting of these amendments is now assigned for error. We do not think the decree should be reversed for this cause alone. As a general rule, these amendments are in the discretion of the Circuit court; and when admitted for furtherance of justice, we ought not to listen to the objection, *unless the party can show that his substantial rights have been prejudiced by the amendments which have been allowed.* A case might exist, and we are not prepared to say that this is not that case, where it would be the exercise of a judicious discretion to permit amendments even to the extent allowed here; *but certainly, except to make new parties, amendments should not be allowed after a cause has been submitted to the court, unless under extraordinary circumstances of necessity.* That the court has authority

to allow such amendments upon proper conditions, there can be no doubt; for, without looking into the English practice on the subject, we find the authority expressly given in the thirty-fourth section of our chancery act."

In *Booth* v. *Wiley*, 102 Ill., 84, on page 100, after reviewing the authorities on amendments, the court says: "Such amendments, must, of course, *only be allowed when, or on such terms as that, no undue advantage will thereby be obtained over the opposite party*, and upon payment of costs thereby occasioned." And the court goes on to say that the plaintiffs in error were not prejudiced by the amendment that was allowed in the court below.

It is plain from the authorities where an amendment is allowed after hearing:

1. That the case declared by pleadings and proof must clearly entitle plaintiff to relief.

2. That the amendment must be in its nature, purely formal, not setting up new matter or praying new relief.

3. That the amendment permitted must be such as calls for no further answer from the defendant, and for no further proof.

4. That the amendment must be of such a nature that when incorporated in the original bill, the answer filed thereto will still be a full, fair and complete answer to the bill as amended. If the amendment introduces into the original bill anything which the answer does not fully and fairly cover, then it is clearly improper for the amendment being purely formal, and the defendant never been permitted to either amend his answer or to file a new answer, it would work a great injustice to permit the introduction by amendment after hearing of matter not covered by the answer and thereupon not within the contemplation and

consideration of the defendant when the proofs were taken.

5. And this rule may be gathered from the authorities and will commend itself to the court; that no amendment will be permitted after hearing to support decree which will introduce matters not fully and fairly covered by the answer and which, if they had been originally set out in the original bill, would have required an answer.

6. In short, the plaintiff after hearing, cannot seize upon isolated bits of testimony and proof which when given were, perhaps, passed unheeded and as of no importance by both sides, and found thereon an amendment which so wholly changes the issues involved as to be a complete surprise to the defendant, and so rob him of the right to answer and introduce evidence to rebut the plaintiff's case as amended.

All that is said of amendments to original bills applies with equal or greater force to amendments to cross bills.

Applying these propositions to the case at bar, it appears:

1. The original bill filed on behalf of the Chicago and Pacific Railroad Company and its lessee, the Chicago, Milwaukee and St. Paul Railway Company, was simply and solely a bill for an injunction to restrain the defendants from selling the Chicago and Pacific on execution to satisfy a certain judgment held by defendants.

That the position taken by plaintiffs in original bill was well taken, is demonstrated by the fact that the court after answer and hearing granted the injunction.

2. The defendants filed cross-bill setting forth their judgment for $36,165.36, and praying that it might be declared a lien upon all the property of the Chicago and

Pacific Railroad, and that in default of payment of same a receiver should be appointed to take control of all the property of said Chicago and Pacific Railroad and satisfy the judgment.

No relief was prayed against the lessee, the Chicago, Milwaukee and St. Paul Railroad Company, and there was not a line in all the pleadings which directly or indirectly charged that company with any interest in the suit except as lessee.

There was not a line which intimated that the Chicago, Milwaukee and St. Paul Railway Company either held or had misappropriated any trust funds of the Chicago and Pacific.

3. Answer was filed to cross-bill and proofs taken on the issues as disclosed by the pleadings, no question as to a trust fund or the misappropriation of a trust fund being considered for a moment by either side.

But the pleadings and proof show—and it was admitted that when the Chicago and Pacific made its lease to the Chicago, Milwaukee and St. Paul, the road was bonded for $3,000,000 to pay off certain outstanding debts and to aid in constructing the same to the Mississippi river.

Just about six lines of testimony in the whole record, that of Mr. E. Walker, on pages 31 and 34, supports the surprising amendment to the cross-bill permitted by the court after the hearing. That testimony is as follows:

"The whole amount of the $3,000,000 bonds has been "expended in the completion of the road, construction of "a bridge across the Mississippi river, and in the pur- "chase of rolling stock and terminal facilities"; and to the same effect on page 34.

Not another line in the whole record tends to show that any portion of the $3,000,000 was used in the construction of the bridge across the Mississippi.

Without pursuing that matter further, without either side's supposing the funds used in the construction of a bridge had anything to do with the issues, the hearing proceeded and was concluded, and the court found that the plaintiff was entitled to the injunction prayed for in the original bill, and did not find that defendants were entitled to any relief under the cross-bill. In other words, the case as made by bill and cross-bill, and answers thereto, was decided in favor of plaintiffs.

Then it was that the defendants, under pretense of amending their cross-bill to make it conform to the evidence, changed their base entirely and prayed for an entirely new relief.

They charge that the "Chicago, Milwaukee and St. "Paul Railway Company, instead of using all the $3,000,- "000 to pay off outstanding indebtedness of the Chicago "and Pacific railroad and in constructing and equipping "it *to* the Mississippi," used a large portion of the proceeds of said bonds in building a bridge across the Mississippi river and thereby misapplied a large portion of the proceeds of said bonds, and used the same for another purpose than those for which said bonds were issued. (Rec., 50.)

And they insert prayer for an entirely new and different relief and against the Chicago, Milwaukee and St. Paul Railway Company, while their original prayer was against the Chicago and Pacific alone. They pray that the Chicago, Milwaukee and St. Paul Railway Company may be decreed to pay the judgment and costs.

To this remarkable amendment, introducing an entirely new and distinct issue, not hinted at in either the original bill or the cross-bill, the plaintiff objected most strenuously and asked leave to file an answer to the new charges in the amendment. (Rec., 53-55.) The Chicago, Milwaukee and St. Paul Railway Company denied the charges and offered to prove that it had expended more than $4,000,000 in the construction and proper equipment of the road *to* the Mississippi and that therefore if any portion of the $3,000,000 realized from sales of bonds had been used in constructing a bridge " such use was not a fraud upon " any of the judgment creditors of the said Chicago and " Pacific Railroad Company for the reason that said de- " fendant expended more than the full amount of said funds " in the construction, completion and equipment of said " road and in the discharge of other claims and obligations " referred to in the preamble and resolutions attached " to lease."

The court refused leave to file this answer, and entered a decree against the Chicago, Milwaukee and St. Paul company upon the cross-bill *as amended*, that it should pay the $36,165.36 judgment with interest and costs, also the $5,304.20 redemption money (Rec., 57), in all $41,469.56 with interest and costs.

This decree was entered upon the assumption:

1. That the $3,000,000, proceeds of bonds sold constituted a trust fund in the hands of the Chicago, Milwaukee and St. Paul Railway Company.

2. That a portion of such trust fund had been misappropriated in the construction of the bridge across the Mississippi.

Aside from the irrelevancy of the cross-bill and the

amendment thereto, and admitting for the moment that the $3,000,000 constituted a trust fund in the hands of the Chicago, Milwaukee and St. Paul Railway Company, and that some portion of it was used in the construction of a bridge—in other words admitting, for the moment all that the appellee contends for, it is apparent to the court—

That there is not a line, nor a word in the whole record which shows how much of the $3,000,000 went into the bridge. It might have been one thousand dollars or one hundred thousand. The record is *absolutely silent* on that point. Now without evidence as to the amount of the trust fund misappropriated, how is it possible, in equity, to enter up a decree arbitrarily against a trustee, at the same time refusing the trustee the right to show just how the fund was used, and whether he had used much or little, or none at all outside the objects of the trust.

III.

THE CROSS-BILL AS AMENDED IS NOT GERMANE TO THE ORIGINAL BILL.

The argument supporting this proposition is included in the argument under the two preceding heads.

Certainly if the cross-bill had been filed originally in the amended shape no court could have held that it is germane to the subject-matter of the original suit. It is entirely different. It involves the enforcement of a trust, or the following of a trust fund.

IV.

THE DECREE IS NOT SUPPORTED BY THE EVIDENCE.

The court decreed:

1. That the Chicago, Milwaukeee and St. Paul, Railway Company should pay to the appellee the $5,304.20 redemption money from the sale to Albert Keep. (Rec. 57.)

There is not in the whole record a scintilla of evidence warranting that decree. There is not a scintilla of evidence that the Chicago, Milwaukee and St. Paul Railway Company ever received a dollar of the redemption money. On the contrary it is expressly denied (Rec., 35), that Mr. Alexander Mitchell made the redemption for, and on behalf of the Chicago, Milwaukee and St. Paul Railway Company.

There is no evidence whatsoever, either direct or indirect to support this portion of the decree.

2. It is decreed that the Chicago, Milwaukee and St. Paul Railway Company shall pay the $36,165.36 judgement held by appellee. (Rec., 57.)

There is no evidence in the record warranting such a decree. As before stated, assuming for the moment that the Chicago, Milwaukee and St. Paul Railway Company misappropriated any funds of the Chicago and Pacific, its liability would extend no further than the amount misappropriated, and as to the amount, if any, whether large or small, the record is absolutely silent, and the Chicago, Milwaukee and St. Paul was not permitted to introduce any evidence, either to show that no funds had been misused or the amount of any possible misappropriation.

There is no contention over the finding of the court, except as to the following:

"And it further appearing to the court that the Chicago, Milwaukee and St. Paul Railway Company extended the road of the Chicago and Pacific Railroad Company to the Mississippi river, at Savannah, where it, the Chicago, Milwaukee and St. Paul Railway Company, constructed a bridge across the said Mississipi river with the proceeds of said bonds, and has ever since operated the road as part of its line between Chicago and Omaha."

There is no evidence to support this finding of the court except the following (page 34 of printed record):

"Q. Can you furnish, or have furnished a detailed statement of the manner in which the $3,000,000 raised by bonds and mortgage referred to, has been expended?

"A. I don't know whether I could obtain that statement or not; it would be very difficult to furnish a detailed statement for the reason that the entire track of the road between Chicago and Byron has been practically relaid; a good deal of money has been paid out to procure title to the right of way; also, there has been paid out a large amount of money for fencing and for improvements of the grade; that is, by cutting out steep grades, and in building new station-houses and repairing the track generally. The road, at the time of the sale, and at the time of the execution of the lease, as a matter of fact, was not more than half built, so that it had to be rebuilt. Then, in addition to that, they extended the line from Byron to the Mississippi river, and built a bridge across the river, and the proceeds of the bonds went into all that. I don't think it would be possible for me to show in detail how the money was expended.

"Q. Is there any one of the employes of the Chicago and Pacific, or the Chicago, Milwaukee and St. Paul, who could furnish a detailed statement?

"A. I could not tell you that now; I could ascertain; the books are all kept at Milwaukee. I have never examined the books.

"Q. Was there any portion of the $3,000,000 used

in redeeming from the sale under the Blair mortgage referred to in the original bill?

"A. The entire amount paid for the redemption of the property from the sale under the Blair foreclosure was paid out of the proceeds of the bonds in this way: The Chicago, Milwaukee and St. Paul company advanced the money to make the redemption; the redemption was made after the execution of the lease and mortgage under these resolutions. The advance was made by the Milwaukee and St. Paul company, and they were repaid out of these bonds—the proceeds resulting from the sale of the bonds. Then, in addition to that, there was paid out a large amount of money to various bondholders to satisfy deficiency decrees that were entered in the Blair case in favor of the holders of these bonds. Among others, we had to pay about $80,000 to the holders of the bonds that were hypothecated by the Third National Bank as security for this loan."

No further inquiry was made as to the use made of the $3,000,000. The plaintiff was informed that the books were all at Milwaukee, but no effort was made to obtain a detailed statement of the expenditure of this amount of money.

The court does not find a wrongful diversion or a misapplication of a trust fund.

After the finding of facts, the court held that the "complainant in the cross-bill, and its amendment, is entitled "to relief." The record shows that the finding and the decree of court, the amendments to the cross-bill and the exceptions to the draft of decree were all entered of record on the fifteenth day of February, 1886. As a matter of fact, the amendment to the cross-bill was not offered or suggested until after the court had formally made its finding of facts, and indicated the form of decree that should be enrolled.

The contract between the two railroad companies does not create a trust, either direct or by implication.

There is no contract between the parties except the lease.

By reference to this lease and the resolutions of the stockholders authorizing its execution, it will be found that the Chicago, Milwaukee and St. Paul Company only undertook to furnish the necessary money for the redemption of the railroad, franchises and appurtenances from sale under the foreclosure decree; to relieve such property from all then existing judgment liens, and also to complete and equip the road from the Chicago, to the Mississippi river.

It did not undertake to discharge all of the indebtedness of the Chicago and Pacific company, nor did the lease provide that the $3,000,000 realized from the sale of the bonds should be appropriated or applied to the discharge of any claims, save those that were then judgment liens upon the propery.

After the redemption of the property from sale under the foreclosure decree, there was no mortgage lien upon the same and the judgments then entered, were valid liens upon such property.

All were discharged except the Tabor judgment.

Under an execution issued upon this judgment the property of the Chicago and Pacific Company was sold, and the lien of said judgment was thereby extinguished.

True, the sale of the property under such execution was unlawful, but that fact would not restore the judgment lien. The plaintiff received the amount realized, the judgment was satisfied, and it is wholly immaterial

for the purpose of this discussion whether the purchaser under such sale acquired a valid title to the property, or not.

A certificate of sale was issued by the Marshal, following the statutes of the State of Illinois, and the appellee elected to undertake the redemption of the property.

It was a mere business venture, and if the appellee did not thereby acquire a valid title to the railroad property under such sale, the payment of the necessary amount of redemption money would not authorize the decree herein entered for the protection of the appellee. The bank by reason of its attempted redemption had no claim legal or equitable, upon the property of either of the railroad companies, much less upon the appellant.

Neither the lessor no. lessee derived any benefit whatever from such redemption, and therefore, it was error in the court to enter a personal decree against the appellant for the amount of such redemption money.

Nor did the appellant in its contract with the Chicago and Pacific company assume the payment of the outstanding claim of the Third National Bank, reduced to judgment on the 3d day of April, 1882. Nor did the appellant receive from the Chicago and Pacific Railroad Company any bonds or proceeds of bonds, or any moneys for the payment and discharge of appellant's claim or judgment.

No direction was given the appellant relative to the payment of such claim, nor has it ever received from the Chicago and Pacific company or from any other source any moneys that in equity should be applied to the discharge of said claim.

Conclusion.

It is respectfully submitted that the decree entered upon the cross-bill and amendment thereto should be reversed.

E. Walker,
Solicitor for Appellant.

Office Supreme Court U. S.
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JAMES H. McKENNEY.
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REPLY BRIEF FOR APPELLANT.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. 174.

THE CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY, APPELLANT,

vs.

THE THIRD NATIONAL BANK OF CHICAGO.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

E. WALKER,
SOLICITOR FOR APPELLANT.

BARNARD & GUNTHORP, LAW PRINTERS, CHICAGO.

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Reply Brief for Appellant.

I.

The respective solicitors for the appellees have filed separate briefs, each contending:

1st. That the Third National Bank of Chicago acquired the right to sell the property of the Chicago and Pacific Railroad Company under its execution, by virtue of the redemption proceedings under the Tabor judgment.

2d. That the Chicago, Milwaukee and St. Paul Railway Company is guilty of a misapplication of a trust fund.

Referring to the printed record (page 41), we find that the execution was levied upon the road-bed, station-houses, depot grounds and other property of the Chicago and Pacific Railroad Company, as located and constructed through the counties of Cook, DuPage, Kane, DeKalb, Ogle and Carrol, in the State of Illinois; and that such property was duly advertised for sale. The franchises of the company were not included, but, on the contrary, by direction of the Third National Bank, the marshal was about to sell the real and personal property of the company disconnected from its franchises. The learned counsel admit that there could be no sale of the franchise of the company under an execution, but insist that under the statutes of the State of Illinois, the real and personal property of the company could be severed from the franchise and lawfully sold under the execution.

Section 1st, chapter 144, Starr & Curtiss' Statutes of Illinois, page 1907, is cited as authority in support of this proposition. This statute provides that any number of persons, not less than five, may become an incorporated company with power to construct and operate railroads within the state, and also purchase railroads sold under decree of foreclosure. The statute does not authorize the sale of a railroad under an execution, nor does it authorize a sale of the real and personal property of a railroad disconnected from its franchise. This is no longer an open question in the State of Illinois. There never has been a sale of a railroad under an execution, or at least there is no reported case wherein it has been held by the Supreme court that such sale would be lawful, or that the purchaser could acquire a valid title to the property under such sale.

Following the case of *Brine* v. *Insurance Co.*, 96 U. S., 627, it was contended that the right of redemption given by the Illinois statute constituted a rule of property that should be applied to railroads as well as other property, and that the company had this statutory right of redemption from sales under foreclosure decrees. This right was denied in *Peoria & Springfield R. R. Co.* v. *Thompson*, 103 Ill., 187, and it was also held that the franchise of a railroad company could not be separated from its other property. On page 208 the court says: "From "the very nature of the property one would be useless "without the other. The franchise could not be used "at all without the road, and the road could not lawfully "be used as against the state without the franchise. "Under such circumstances to avoid the possibility of "conflicting ownership, the law has wisely determined "that both must be sold as an entirety, and cites *C., D. "& V. R. R. Co.* v. *Loewenthal*, 93 Ill., 483.

"In *Gue* v. *Tide Water Canal Co.*, 24 How., 257, it "was held that the franchise of a corporation could not "be sold under execution, and further, that the real "estate necessary to the uses and purposes for which it "was created could not be seized and sold under *fieri* "*facias* separately from its franchise."

This case was followed by the later case of *Hammock* v. *L. & T. Co.*, 105 U. S., 77. Authorities are hardly necessary in support of this proposition, as it appears that the district judge first held that the judgment creditor could not sell a railroad or railroad property under an execution at law, and that the circuit judge entered a decree perpetually enjoining and restraining the marshal from selling the property under said writ. (Page 51.) No exceptions have been taken to this decree, and no cross-errors assigned by the appellee, and therefore the decree that the attempted sale of the railroad property under said execution was unlawful, is final.

II.

Both counsel for the appellee assert that the Chicago, Milwaukee and St. Paul Railway Company, in its use or application of the funds realized from the sale of the $3,000,000 of bonds, was guilty of a misappropriation of a trust fund. They assume that either an express or implied trust was created by the lease of the Chicago and Pacific Company to the Chicago, Milwaukee and St. Paul, and that under such contract the position of the latter company was that of trustee. It is claimed that both the district and circuit judges, in their opinions, copies of which are attached to the brief of Mr. Jackson,

solicitor for appellee, held that such trust was established by the record. The district judge did not so hold, but suggested that it was left uncertain "whether there may "not be yet in the hands of one of these complainants, "either the Chicago and Pacific Railroad Company or "the Chicago, Milwaukee and St. Paul Railway Com- "pany, assets with which to pay the indebtedness grow- "ing out of the proceeds of these bonds or some other "means, and it has occurred to me—I simply mention it "for the consideration of the counsel—unless some settle- "ment can be effected, whether the proper course would "not be to file a cross-bill and ask for the appointment of "a receiver." This suggestion was followed by the learned counsel, and a cross-bill was filed at the December term, 1882 (page 20 of the record.)

The cross-bill does not charge the creation of a trust, nor does it charge a wrongful diversion of any trust fund; but, on the contrary, after reciting the recovery of the Tabor judgment, the sale of the property of the Chicago and Pacific company on the execution issued under said judgment, its purchase by Albert Keep, the sale and assignment of the certificate of sale to Alex. Mitchell, the redemption by the Third National Bank, and the recovery of the Third National Bank judgment and levy of its execution upon the property of said company, the cross-bill charges that the "lease and trust deed by virtue "of the redemption proceedings aforesaid was junior and "subsequent to the appellee's judgment and lien." The cross-bill also charges that such "judgment and the "redemption money so paid as aforesaid constitute an "equitable lien upon the said Chicago and Pacific Rail- "road Company; that it has no remedy upon the said "judgment at law, or for the recovery of the redemption

" money so paid as aforesaid, and can only obtain the fruit " thereof by interposition of this honorable court." (Rec., 22.) The cross-bill demands as relief, that the court should decree that said judgment and the amount paid for the redemption from sale under the Tabor judgment be an equitable lien and incumbrance upon the property of the said Chicago and Pacific company, and that a receiver be appointed with the usual powers of receivers in like cases; that such receiver be let into and take possession of the property of said company, with power to manage and operate said road; also that said property may be decreed to be sold under the order and direction of the court, and out of the proceeds arising from such sale that said cross complainant may have satisfaction of its said judgment, and the amount paid by it for redemption from the sale made to the said Keep.

These are the substantial charges of said cross-bill, and the relief demanded thereunder. There is no charge whatever that either a trust or trust fund had been created for the purpose of satisfying appellee's claims, or the claims of any other creditor of the Chicago and Pacific company. There is no charge, and no issue was presented that the Chicago, Milwaukee and St. Paul company became a trustee by virtue of such lease, or that it received from the Chicago and Pacific company, or from the proceeds arising from the sale of the bonds of that company, a trust fund for the satisfaction of either of said judgments, or that it undertook, promised or agreed to pay or discharge either of said claims.

The appellant's answer admits the material allegations of the cross-bill, and especially the pretended sale under the Tabor execution, but avers " that said sale and re-

solicitor for appellee, held that such trust was established by the record. The district judge did not so hold, but suggested that it was left uncertain "whether there may "not be yet in the hands of one of these complainants, "either the Chicago and Pacific Railroad Company or "the Chicago, Milwaukee and St. Paul Railway Com- "pany, assets with which to pay the indebtedness grow- "ing out of the proceeds of these bonds or some other "means, and it has occurred to me—I simply mention it "for the consideration of the counsel—unless some settle- "ment can be effected, whether the proper course would "not be to file a cross-bill and ask for the appointment of "a receiver." This suggestion was followed by the learned counsel, and a cross-bill was filed at the December term, 1882 (page 20 of the record.)

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The appellant's answer admits the material allegations of the cross-bill, and especially the pretended sale under the Tabor execution, but avers "that said sale and re-

"demption were without authority of law, and were there-
"fore each wholly void." It denies all knowledge of the purchase of the certificate of sale by Mitchell as charged in the cross-bill, and denies that said purchase if made as charged, was in the interest of said Chicago and Pacific Company, or that said company was benefited thereby, or had any interest therein. It admits the execution and delivery of a lease of the property to the Chicago and Pacific Company to the appellant, also the execution of a trust deed to the Farmers Loan and Trust Company to secure an issue of $3,000,000 of bonds then outstanding, and avers that the lien of said trust deed and lease, are paramount to the lien of the appellee's said judgment. This answer was filed on the 27th day of April, 1883. The cause was referred to the master, proofs taken, and came on for final hearing on the 24th day of November, A. D. 1885, when motion was made by the appellees to amend their cross-bill "so as to conform to the testimony" in the record. Upon the objections of appellant's counsel the court took the motion under advisement. The hearing was concluded on the 25th of November when the court took the entire cause under advisement. (Rec., 48.) On the first of February, 1886, the parties again appeared in court for the purpose of settling the decree according to the finding of the court, when appellees, by their counsel stated in open court that "they would not insist upon their motion "for leave to amend their cross-bill," whereupon the cause was again continued on objections of appellant to the draft of decree. (Rec., 49.) It appears from the record that the circuit judge had entered his findings of fact and filed his opinion prior to the 1st day of February, and that the amendments to the cross-bill were not filed until the 15th

day of February, 1886. On the last named day the court entered its decree in favor of the complainants in the original bill, and also the personal decree against this appellant, from which this appeal was prayed and allowed. It therefore appears that the cause was finally heard and decided by the circuit judge more than two weeks prior to the time of filing the amended cross-bill. This opinion is filed as an appendix to the brief of Mr. Jackson, one of the counsel for the appellee (p. 42). The finding of facts is substantially the same as charged in the cross-bill.

On page 46 the Circuit court says: "The bank filed "its answer and cross-bill. After reciting the facts the "cross-bill prayed that the bank's judgment, and the "amount paid to redeem from the sale under the Tabor "judgment be decreed to be a lien upon the property of "the Chicago and Pacific company; that the court take "possession of all such property, operate it by a receiver, "and out of the earnings pay the amount due the bank. "Testimony was taken and the case is now before the "court on final hearing. The Tabor judgment was a "valid lien upon the property of the Chicago and Pacific "company within the meaning of the lease, when that "property was surrendered to the Milwaukee company. "It was necessary to redeem from the foreclosure sale "and thus get rid of the trust deed executed in 1872 and "the decree foreclosing it, before executing the lease, and "the joint bonds and the trust deed to secure them. The "Tabor judgment was a lien second only to the lien of the "foreclosed trust deed, and when the lien was discharged, "as it certainly was by the payment and acceptance of "the redemption money, the Tabor judgment, so far as the "pleadings and testimony show, stood as the first lien. "The Milwaukee company agreed to protect the leased

"property against all valid judgment liens. The Tabor "judgment was such a lien, and the obligation to pay it "was no less binding than the obligation to do the other "things specified in the lease as part of the consideration "of its execution. It is not material, therefore, whether "the Milwaukee company agreed to protect the leased "property against the Tabor judgment or not, as that "company could not hold and operate the property for "its own benefit in disregard of the rights of Tabor, "or his assignee."

The court further held that the bank recovered its judgment on April 2, 1882, "which was after the Mil- "waukee company had taken possession under the lease. "It follows that the latter company was not bound by its "covenant to pay this judgment or the debt for which it "was taken. Being embarrassed and without credit, the "Chicago and Pacific company was authorized to dispose "of its property as it did in the above arrangement, for "the purpose of having the Milwaukee company to do "what it, the Chicago and Pacific company was unable "to do, there being nothing in that arrangement, if fairly "carried out, which could prejudice creditors. It was "estimated that the bonds would enable the lessee of the "company to redeem from foreclosure sale, pay all exist- "ing judgment liens, complete the road to the Mississippi "river, relay the portion already in operation with steel "rails, procure necessary facilities, depot grounds, etc., "and fully equip the entire line. The fund arising from "the sale of the bonds was to be used for this and no other "purposes. Any diversion from it, or any part of it, to other "objects or purposes was not permitted by the contracts. "The road was to be completed to the Mississippi river, "not to and across the river. If the entire proceeds of

"the bonds had been expended in accordance with the "the terms of the lease, the bank's debt for the money "which it lent to the Chicago and Pacific company could "not be asserted in law or equity against the Milwaukee "company, or the leased property in its possession. The "record shows, however, that the latter company did all "the terms of the lease obliged to do, except paying the "Tabor judgment, and still had in the treasury a sum "sufficient to pay for the construction of a bridge across "the Mississippi river."

The court did not hold that the appellant had been guilty of misappropriation of a trust fund, but, on the contrary, that it had performed all its covenants, except the payment of the Tabor judgment. We think the court is in error in its finding of fact; that after the appellant "did "all that the terms of the lease obliged it to do," it still had in its treasury a sum sufficient to pay for the construction of a bridge across the Mississippi river. There was no charge in the cross-bill authorizing this finding, nor was such an issue presented, and for that reason, appellant's answer to the cross-bill did not attempt to meet such charge. It is altogether a new issue suggested by the opinion of the court, but there was no evidence offered in support or denial of such charge. The appellant was not required by the cross-bill to offer any evidence relative to the disposition of the proceeds of the $3,000,000 of bonds, much less was it required to show whether any portion of said bonds entered into the construction of the bridge across the river. The court simply finds that after the appellant had performed all the covenants of its lease, especially after it had redeemed the road from sale under the foreclosure decree, and had discharged all the judgment liens existing, or in force, at the

time of the execution of the lease, and had also completed and equipped the road as required by its covenants, there still remained an unexpended balance of the funds in the hands of the appellant, belonging to the Chicago and Pacific Railroad Company. If this was true, then the appellees had the right to proceed under our statute, either by a garnishment or by a creditor's bill, or bill in the nature of a creditor's bill, as authorized by the statute to reach such funds, and by decree of court require the application of such balance, whatever it might be, to the discharge of appellee's judgment. No bill whatever was filed for this purpose, nor was there any prayer authorizing the entry of such decree. The purpose of the cross-bill was to establish by decree of court an equitable lien in favor of the appellee for the amount of its judgment, together with the amount paid for redemption from the sale under the Tabor judgment, and for the appointment of a receiver to enforce the discharge of such lien. This was the relief demanded, and nothing more. Had a creditor's bill been filed charging that appellant had in its hands or under its control property or assets belonging to the judgment debtor, interrogatories would have been filed calling upon the appellant to answer under oath relative to such property or assets, and also as to the disposition of the proceeds of the $3,000,000 of bonds, and of the amount remaining in its hands after the performance of the covenants contained in the lease. The appellant would then have had the opportunity of making a full disclosure, but under this cross-bill the appellant was denied the right to make such disclosure. Indeed, such evidence would have been irrelevant and improper, as not germane to the issue presented. The Circuit court has not decreed that the

contract of lease created a trust in favor of appellee, or that the relative position of these parties was that of trustee and *cestui que trust*, but, on the contrary, has expressly held that no such confidential relations existed. Without evidence as to the amount of money expended by the appellant, the court has "ordered, adjudged and "decreed that the Chicago, Milwaukee and St. Paul Rail-"way Company pay in to the clerk of this court within "thirty days, an amount of money sufficient to satisfy the "judgment, costs and interest rendered in favor of the "Third National Bank of Chicago, against the Chicago "and Pacific Railroad Company, including also the "amount, with interest, paid by the Third National Bank "of Chicago to the United States marshal for the North-"ern district of Illinois, to redeem from the sale to Albert "Keep as aforesaid." Therefore it appears that under a bill filed for no other purpose than to enjoin an unlawful sale of the property of the Chicago and Pacific company, of which the appellant was lessee, under the cross-bill a decree has been entered requiring of this appellant the payment of the entire debt with interest and costs of suit, and upon its failure so to do, a receiver of all of the property of the Chicago and Pacific Railroad Company embraced within the lease may be appointed by the court with authority to operate the railroad for the benefit of the appellee, and finally to sell the property for the purpose of satisfying appellee's judgment and claim.

The position of appellee's counsel is, that while the court has decreed that the sale of this property under execution is unauthorized by law, the court may decree the entire property sold by its master or other officer of court, for the purpose of satisfying the same judgment and claim. Surely, this is an unusual, if not an unprecedented procedure.

Appellant's counsel assert that even without the amendments to their cross-bill, the court, under prayer for general relief, could have entered the decree from which this appeal has been prosecuted. The learned counsel are clearly in error in this position, for the reason that such a decree would not be in accord with the issues presented by the cross-bill and answer.

The rule is clearly and concisely stated in *Battle* v. *The Mutual Life Insurance Co., etc.*, 10 Blatch., 417. Mr. Justice BLATCHFORD says: "It is a well settled rule in a "suit in equity, that the plaintiff can recover only upon the "case made by his bill and not upon that made in the "evidence. It is equally well established that if an ad- "mission is made in the answer, it will be of no use to "the plaintiff unless it is put in issue by some charge in "the bill. Hence the plaintiff is frequently obliged to "ask leave to amend his bill, although a clear case for "relief is apparent upon the face of the pleadings. Thus "where a bill against an executor prays an account of "the personal estate of the testator on the ground "that the executor has received assets, but does not "charge any acts of mismanagement in the executor, no "decree for an account can be had as to acts of mis- "management, although the answer discloses such acts "and shows that in consequence of them no assets were "received. The reason is that such matter is not matter "in issue." Story Eq. Pleadings 8th Ed., Sec. 262, A. 264.

It is also a well recognized rule that the plaintiff must make out his case by proper allegations and corresponding proofs; evidence without a proper allegation will not sustain a decree, for the same reason that a judgment or decree cannot be supported without the necessary evidence.

In *Conley* v. *Belt*, 5 Cran. C. C., 405, it is held that the relief granted must always be consistent with the allegations of the bill. If a bill seeks to avoid a sale made by a trustee under a deed of trust, and does not ask for a decree for the surplus money in the hands of the trustee arising from the sale after satisfying the debt, the plaintiff is not entitled to such relief under the prayer for general relief.

Also, in *Vorhees* v. *Bonesteel*, 16 Wall.: "Affirmative "relief cannot be granted in equity upon the ground of "fraud, unless it be made a distinct allegation in the bill, "so that it may be put in issue by the pleadings."

A party cannot make out one case by his bill and another by his proofs, but they must correspond to entitle him to relief in a court of equity. His allegations and proofs must correspond.

Tuck v. *Downing*, 76 Ill., 71.

Appellant's counsel, in the absence of any charge, allegation, issue, evidence, or decree of court, assert that a trust fund was created and that the appellant was guilty of an unlawful diversion of such trust fund, and then proceed to cite authorities in support of the well recognized proposition that where a trustee is guilty of the unlawful diversion of a trust fund, he will be personally liable to the *cestui que trust*. It is not claimed or pretended that the appellant, when it accepted the lease of the property of the Chicago and Pacific company, covenanted to pay and discharge all the indebtedness of the lessor, but, on the contrary, it only undertook and agreed to discharge the then existing liens upon such property, to redeem, complete, equip and operate the railroad. The Chicago and Pacific Railroad Company at the time

was utterly insolvent, and was not in the possession of any property or assets of any kind or character. It required upwards of one million dollars to redeem its property from the foreclosure sale, and it was estimated that the proceeds of the $3,000,000 of bonds would enable the company not only to redeem its property, but also, to discharge all the then existing judgment liens, and to complete and thoroughly equip the road. The amount of floating indebtedness was not stated, and no provision whatever was made to discharge such floating indebtedness. If it be true that there was a surplus left in the hands of the lessor after performing all its covenants under the lease, such balance might, by proper procedure, be subjected to the payment of other claims not embraced in the contract, but there was no agreement, either express or implied, that the appellant should pay or discharge the claim of the appellee. It was not in judgment at the time of the execution of the lease, and therefore, was not a lien upon the property of the Chicago and Pacific company. The Tabor judgment was at the time a lien, but Tabor elected to satisfy his judgment by a levy upon, and sale of the property of the Chicago and Pacific company. The lien of the judgment was thereby discharged, and the holder of the certificate of purchase, or his assignee, could not thereafter, either in law or in equity, enforce the lien of said judgment against the property of said company. The authorities cited by the learned counsel do not meet, and have no application to the case made by the record—it does not disclose either an express or implied trust. In *Waldron* v. *Skinner*, 11 Otto, 577, this court, speaking by Mr. Justice CLIFFORD, says: "Trusts are either ex-"press or implied. The former being such as are raised

"or created by the act of the parties, and the latter being "such as are raised or created by presumption or con- "struction of law." *Cook* v. *Fountain*, 3 Swan., 585–592: "Implied trusts may also be divided into two gen- "eral classes: first, those that rest upon the presumed "intention of the parties; second, those which are inde- "pendent of any such express intentions, and are forced "upon the conscience of the party by operation of law."

The Circuit court did not hold that the contract of the parties disclosed an express trust, nor can it be held that, by presumption or construction of law, this contract creates an implied trust. The Circuit court did not so construe the contract, but, on the contrary, held that after the application of the proceeds resulting from the sale of the bonds, as provided in the lease, there still remained a balance in the hands of the Milwaukee company. If the finding of the court, in respect to this balance, was correct, still it does not follow that at the time the bill was filed, or the decree entered, such balance still remained in the hands of the lessor. It is claimed that such balance was wrongfully appropriated to the construction of a bridge across the Mississippi river, but we deny that there is any substantial proof that any part of the proceeds of such bonds went into the construction of such bridge, or that there was any balance left of such proceeds after the redemption of the road and its completion, as provided for in the lease. It is true that the original bill contains the following averment: "That said lessee with the "means provided by the execution of said last named "trust deed and bonds, and the proceeds of the sale "thereof, *by and with the consent of your orator, the Chi- "cago and Pacific Railroad Company*, has completed the "construction of the entire road authorized by its charter

" from the city of Chicago to the Mississippi river, and " has also constructed a bridge across the Mississippi " river at or near Savanna."

The Circuit court held this charge to be an admission that the bridge across the Mississippi river was constructed out of the proceeds resulting from the sale of the bonds, but entirely overlooks the further charge that whatever application was made, was with the " consent and approval of the Chicago and Pacific Railroad Company." It does not appear that at the time the road was completed and the bridge constructed, the claim of the Third National Bank was even in judgment, and there is no pretense that the bank had any lien, equitable or otherwise upon the proceeds of these bonds. The Chicago and Pacific company, if the funds were in its possession, had the lawful right to apply such funds to any of the reasonable uses of said company, not only to the completion of its road, as provided in its charter, but also to the construction of a bridge necessary to form a connection with a line extending from its western terminal across the State of Iowa. Its charter authorized the construction of a railroad across the State of Illinois from Chicago to the Mississippi river—under this charter the road could be constructed to the center of the river.

If in the lawful exercise of its powers it had the right to construct a bridge to the west line of the State of Illinois, which would be the center line of the Mississippi river, then it follows that it had also the power to authorize the appellant to construct such bridge out of any moneys in its possession belonging to the Chicago and Pacific company. Neither the Chicago and Pacific company or the appellant as lessee has gone beyond the express or implied powers under the charter granted to

the Chicago and Pacific company; but more than this, we repeat that appellee's cross-bill was not filed either for an accounting or for a discovery of assets of the judgment debtor in the possession or under the control of the appellant, and therefore no accounting was ever had, nor was it necessary. The appellant had no authority under its contract of lease to apply any moneys in its possession belonging to the Chicago and Pacific company to the payment or satisfaction of the judgment and claim of the appellee. Had it done so, it would have been without express or implied authority, and the Chicago and Pacific company could have maintained an action against the appellant for the recovery of the amount so paid to the appellee. No decree has been entered against the Chicago and Pacific company or the Farmers Loan and Trust Company, and we apprehend that if the appellant is compelled to discharge this decree it can have no remedy whatever against its lessor, the Chicago and Pacific company.

The amended cross-bill (Rec., 50), after alleging that the appellant has performed all the expressed covenants contained in its contract of lease, charges that said appellant has "wholly failed and neglected to pay "out of the proceeds of said $3,000,000 of bonds, or in "any other way, the judgment of said Horace Tabor, "and the demand of your orator now in judgment; that "instead of applying enough of the proceeds of said "bonds to pay and satisfy these claims, the said Chicago, "Milwaukee and St. Paul Railway Company used a "large portion of said bonds in building a bridge across "the Mississippi river, and thereby misapplied a large "portion of the proceeds of said bonds, and used the "same for another purpose than that for which said

"bonds were issued." The amendment further charges "That the appellant was bound in law and equity to ap- "ply enough of the proceeds of said bonds to pay and "satisfy said judgment in favor of Tabor and the demand "of the appellees."

This is entirely a new charge, and if such amendment, under the most liberal rules of chancery pleading, could be permitted, then the defendant should have been allowed to file its answer meeting the new issue. Its answer to the original cross-bill does not in any manner answer this charge. If the appellant was "bound in law and equity" to satisfy the claims of the appellees, then it would follow that appellant would also be required to satisfy, pay and discharge all claims against the Chicago and Pacific Railway Company, without any reference to the time when such claims were reduced to judgment; nor would it affect the equities of the parties whether such claims had been reduced to judgment or not. But the Circuit court did not hold, nor did it decree, that the appellant was required by the terms of its lease, or by any express or implied covenants therein contained, to pay or discharge the claim or judgment of the Third National Bank, or any other claim not reduced to judgment prior to the execution of the lease.

We respectfully submit that the personal decree entered against the appellant is not supported by the pleading, nor by any evidence that can be held relevant or material under the issues presented.

CHICAGO, December 31, 1889.

E. WALKER,
Solicitor for Appellant.

Office Supreme Court U. S.
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JAMES H. McKENNEY,
CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1889.

No. 174.

CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY,
Appellant,

vs.

THE THIRD NATIONAL BANK OF CHICAGO AND HUNTINGTON W. JACKSON AS RECEIVER OF THE THIRD NATIONAL BANK OF CHICAGO,
Appellees.

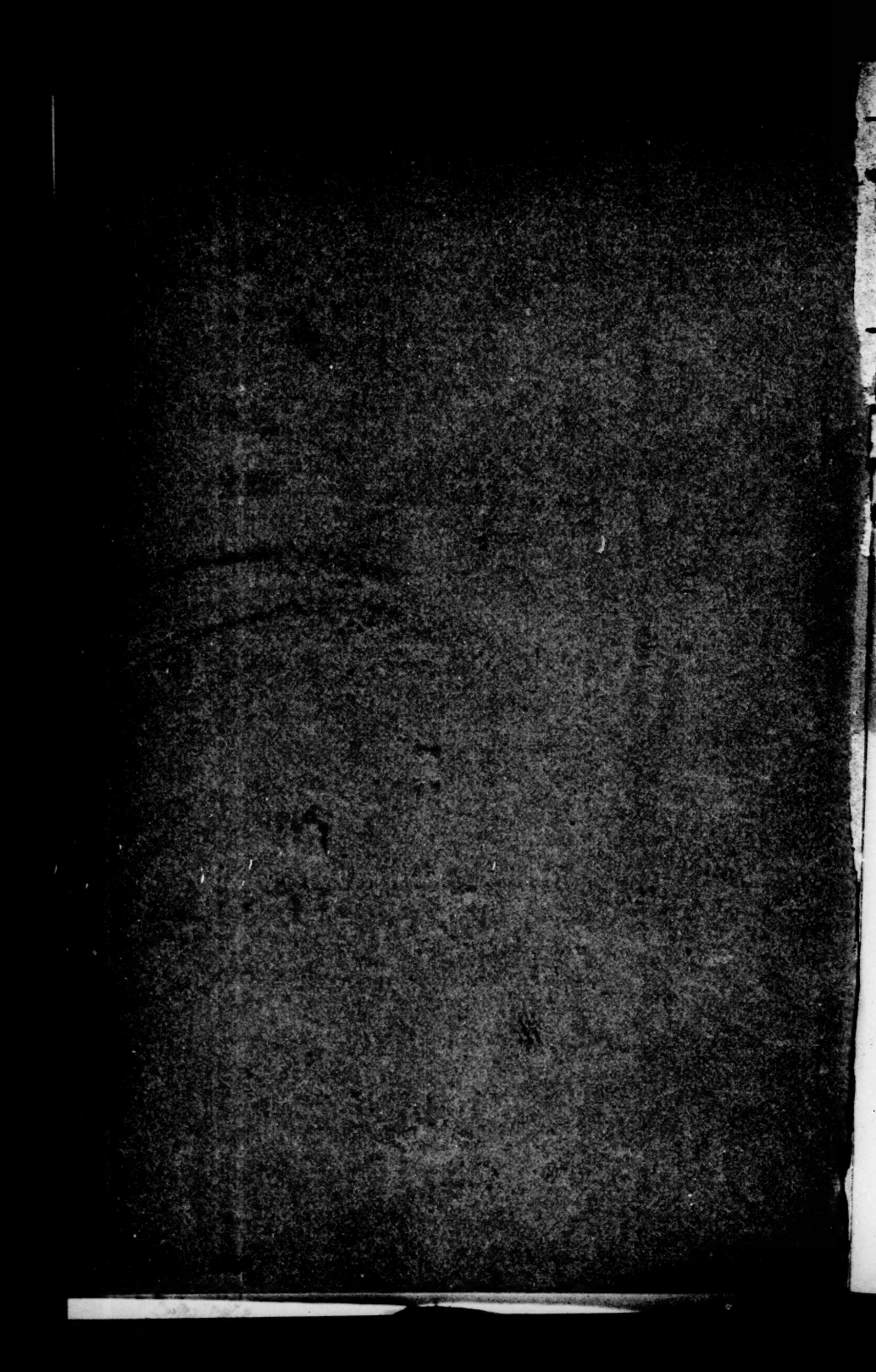
Appeal from the Circuit Court of the United States for the Northern District of Illinois.

BRIEF AND ARGUMENT FOR APPELLEES.

HUNTINGTON W. JACKSON,
SOLICITOR.

JOHN H. THOMPSON,
OF COUNSEL.

BARNARD & GUNTHORP, LAW PRINTERS, CHICAGO.



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Appeal from the Circuit Court of the United States for the Northern District of Illinois.

STATEMENT.

The Chicago and Pacific Railroad Company, by a special act of the Legislature of Illinois for 1865, was authorized to construct a railroad *from the City of Chicago to the Mississippi River* at a point near Savannah, all lying in the State of Illinois.

In 1872, it executed a trust deed upon its property to secure the issue of $3,000,000 of bonds.

On the 9th day of March, 1876, judgment was rendered in the United States court for the Northern district of Illinois for the sum of $3,499.73 in favor of Horace Tabor against the Chicago and Pacific Railroad Company and others.

Execution was issued upon the judgment upon the 9th day of September, 1876.

On the 27th day of May, 1876. John I. Blair filed a bill for the foreclosure of the mortgage or trust deed above referred to made in 1872, and on the 1st day of May, 1879, the property of said railroad company was sold for $916,100 to said John I. Blair, and others. Subsequent to April 2, 1880, the Chicago and Pacific company redeemed said property from the sale under the foreclosure decree, the Chicago, Milwaukee and St. Paul company having advanced the money for the redemption. This company was subsequently repaid from the sale of the bonds secured by the joint mortgage of the Chicago and Pacific Railroad Company, and the Chicago, Milwaukee and St. Paul Railroad Company upon the property of the Chicago and Pacific Railroad Company.

On the 19th day of February, 1880, the Third National Bank brought suit in the United States Circuit for the Northern district of Illinois against the Chicago and Pacific Railroad Company upon notes given by said railroad company to the Third National Bank *for money loaned by said bank to said railroad company.*

On the 3d of April, 1882, judgment for $36,165.36 and costs of suit was rendered in favor of the Third National Bank.

On the 15th of July, 1882, execution was issued in favor of the Third National Bank.

Subsequent to the bringing of the suit of the Third National Bank, to wit: April 1, 1880, resolutions were passed by the stockholders of the Chicago and Pacific Railroad company authorizing the leasing of said Chicago and Pacific railroad to the Chicago, Milwaukee and St. Paul Railway Company.

On the 2nd day of April, 1880, the Chicago and Pacific

Railroad Company executed its lease to the Chicago, Milwaukee and St. Paul company, and also on the same day the Chicago and Pacific railroad and the Chicago, Milwaukee and St. Paul executed a joint trust deed on the property of the Chicago and Pacific Railroad Company to secure the payment of bonds to amount of $3,000,000.

On the 25th of June, 1881, the property of the Chicago and Pacific Railroad Company was sold on execution, and a certificate of sale by the United States marshal of the property of the Chicago and Pacific Railroad Company was executed to Albert Keep, who had purchased under the execution issued upon the aforesaid judgment, in favor of Horace Tabor.

On June 4, 1882, Albert Keep assigned the certificate of sale to Alexander Mitchell.

On the 25th of September, 1882, the Third National Bank, as judgment creditor, redeemed from said sale to Albert Keep by the payment of $5,304.20, and a levy was endorsed upon the execution issued in favor of Third National Bank of Chicago, by A. M. Jones, United States marshal: "Of all and singular, "the railroad of the Chicago and Pacific Railroad Company, "as the same is now surveyed, laid out, constructed and located "in the counties of Cook, Du Page, Kane, DeKalb, Ogle and "Carroll, in the State of Illinois, including the road-bed, station-"houses, depot grounds, rails, ties, fences, bridges, viaducts "and culverts, and all other buildings and structures, as well "as engine-houses, machine and other shops used in connection "with the said railway, all being in the State and Northern "district of Illinois, as being the property of said defendant." (Rec., 21.)

Subsequent to the payment of $5,304.20 for redemption by Third National Bank, Alexander Mitchell by E. Walker, his attorney, received said redemption money, and gave his receipt to the said marshal. (Rec., 39.)

The United States marshal, in accordance with the statutes, gave public notice that he would sell on the 24th day of October, 1882, all the property of the Chicago and Pacific Railroad Company, which had been levied upon by virtue of the execution issued in favor of the Third National Bank upon said redemption proceedings. (Rec., 9.)

On the 18th day of October, 1882, the Chicago and Pacific Railroad Company and the Chicago, Milwaukee and St. Paul Railway Company filed their bill against the Third National Bank of Chicago and Huntington W. Jackson, its receiver, to restrain them from proceeding under said writ of *fieri facias* and from selling under the levy of said writ, and after argument upon bill and counter affidavit injunction was issued on the 3d day of October, 1882. (Rec., 11, 15.)

In said bill it was alleged, among other things, the issue of the first mortgage for $3,000,000, its foreclosure and purchase by John I. Blair *et al.* the adoption of the resolution by the stockholders of the Chicago and Pacific railroad, authorizing the execution of its lease; at which time it was also alleged the Chicago, Milwaukee and St. Paul entered into the possession of all the property, both real estate and personal, of the Chicago and Pacific Railroad Company, and had continued in such possession under and by virtue of the terms and covenants of such lease until the filing of said bill.

That the Chicago and Pacific Railroad Company and the Chicago, Milwaukee and St. Paul company executed a joint trust deed upon all the property of said Chicago and Pacific company to secure bonds to sum of three millions of dollars. ($3,000,000.)

That such lessee—the Chicago, Milwaukee and St. Paul Railway Company—*with the means provided by the execution of*

said last named trust deed and bonds, and the proceeds of the sale thereof, by and with the consent of the Chicago and Pacific Railroad Company, completed the construction of the entire road *authorized by its charter*, from the city of Chicago to the Mississippi river, and *has also constructed a bridge across the Mississippi* river at or near Savannah. (Rec., 4.)

The bill also alleged that since said 2d day of April, 1880, said railroad has been thoroughly furnished and equipped with necessary cars, rolling stock and machinery, and that said railroad is now and has been continuously for more than one year last past an entirety, and forms part of the railroad of the Chicago, Milwaukee and St. Paul company between the city of Chicago and the city of Omaha, in the State of Nebraska.

On the 11th day of December, 1882, a motion was made to dissolve the injunction, and after argument, was taken under advisement by the court. Subsequently the court declined to dissolve the injunction, and delivered an opinion, a copy of which is attached to this brief.

The defendants to the original bill filed their answers thereto, and on the 15th day of January, 1885, the Third National Bank of Chicago, by leave of court, filed its cross-bill against the Chicago and Pacific Railroad Company, the Chicago, Milwaukee and St. Paul Railway Company, and the Farmers Loan and Trust Company, setting forth, among other things, the rendition of the judgment in its favor for $36,165.36 and costs, on the 3d day of April, 1882, and that execution was issued thereon July 25, 1882, also rendition of the judgment on the 9th day of March, 1876, for $3,499.73, in favor of Horace Tabor, and the redemption proceedings by the Third National Bank, as heretofore stated. (Rec., 21.)

The cross-bill charged that said Tabor judgment became and was a lien at its rendition upon the railroad and appurte-

nances, and also alleged the sale by the United States marshal of the property of the Chicago and Pacific Co., June 25, 1881, by virtue of a writ of *fieri facias* to Albert Keep, and that the certificate of sale issued to Albert Keep was assigned by the said Keep to Alexander Mitchell. That subsequent to the redemption by the Third National Bank, and *prior to the filing of the original bill of complaint* herein by the Chicago and Pacific company, and the Chicago and Milwaukee company, the said Alexander Mitchell, by his attorney, E. Walker, accepted from and receipted to the United States marshal for the money paid by the Third National Bank under the redemption proceedings. That the said Alexander Mitchell was president of the Chicago, Milwaukee and St. Paul Railway Company, and that E. Walker was president of the Chicago and Pacific Railroad Company. The cross-bill also alleged upon information and belief that the said Alexander Mitchell, in taking the assignment of the said certificate of sale issued to said Keep and receipting for said redemption money so paid by the Third National Bank, did so in the interest of and with knowledge and consent of the Chicago and Pacific Railroad Company. The bill prayed that the judgment in favor of the Third National Bank, together with the amount paid for redemption from the sale to Albert Keep, might be declared a valid and existing lien, created in favor of the Third National Bank upon the property of the Chicago and Pacific Railroad Company, and that a receiver of the Chicago and Pacific Railroad Company might be appointed, and for such further and other relief in the premises as the nature of the case should require. (Rec., 20, 23.)

In order to conform to the evidence in the case, the court allowed the cross-bill to be amended. (Rec., 49.)

The amendments alleged the execution of the lease and trust deed; also that in said lease no rentals were reserved or

to be paid for the property of said Chicago and Pacific Railroad Company for said term of 999 years; that the consideration for the making of said lease was that the Chicago, Milwaukee and St. Paul Railway Company should aid the Chicago and Pacific Railroad Company in procuring a sufficient sum of money to redeem the property of the Chicago and Pacific Railroad Company from the sale made upon the foreclosure of the mortgage to the New York Farmer's Loan and Trust Company, to pay all judgments and demands against the Chicago and Pacific Railroad Company, to extend and construct the road to the Mississippi river, to secure all necessary and terminal facilities, depots and grounds along the line, to relay that part of the road then constructed with steel rails, and to fully equip the road with all necessary rolling stock so as to make the entire line a first-class railroad in all respects, the entire cost of which was estimated at $3,000,000. The amendments further alleged that the Milwaukee company redeemed from the foreclosure sale and completed the road to the Mississippi river, and took possession of the property of the Chicago and Pacific Railroad Company immediately after making the lease, but has wholly failed and neglected to pay out of the proceeds of said $3,000,000 of bonds or any other way the judgment of said Tabor, or the judgment of the Third National Bank. That instead of applying enough of the proceeds of said bonds to pay and satisfy these claims, the said Milwaukee company used a large portion of the proceeds of said bonds *in building a bridge across the Mississippi river and thereby misappropriated a large portion of the proceeds of the said bonds and used the same for another purpose than those for which bonds were issued.*

The amendment also charged that by the arrangement between the said companies, and by its acceptance of said lease, and the use and enjoyment of said property, and by the re-

ceipt of the proceeds of said bonds, the Chicago, Milwaukee and St. Paul company was bound in law and equity to apply enough of the proceeds of said bonds to pay and satisfy the judgment in favor of said Horace Tabor, and the judgment in favor of said Third National Bank, and was also bound to pay the Third National Bank the amount of money paid upon the redemption of said property from the sale under said Tabor judgment, with interest and costs, and the amount of said judgment in favor of the Third National Bank, with interest and costs, and the costs of the pending suit. The prayer of the cross-bill was amended by inserting before the prayer for general relief the following: "Or that said Chicago, Mil-"waukee and St. Paul Railway Company might be decreed "to pay to the Third National Bank the amount paid by it "upon the redemption of the property of the Chicago and Pa-"cific Railroad Company from the sale made on execution is-"sued on the judgment of said Horace Tabor, with interest "and costs, and the amount of said judgment recovered by the "Third National Bank against the Chicago and Pacific Rail-"road Company, with interest and costs, by a short day to "be specified in said decree." (Rec., 49.)

The Chicago and Pacific Railroad Company, and the Chicago, Milwaukee and St. Paul Railway Company demurred to the original cross-bill, which demurrer, on the 26th day of March, 1883, was overruled by the court, and answers and replications were then filed. (Rec., 25, 26, 29.)

The resolutions adopted April 1, 1889 (Rec., 32, 35) and the lease executed April 2, 1880 (Rec., 42), provided, among other conditions, that, whereas, certain other parties, to whom the said party of the second part (referring to the Chicago and Pacific Railroad Company), was so as aforesaid indebted, have prosecuted their several demands in the Superior and Circuit courts of Cook county and other counties of the State

of Illinois, and have procured divers judgments thereon, which now remain unpaid and unsatisfied of record, and are a lien upon the property of the party of the first part, *and others of said demands still remain unliquidated.* And that, whereas, the Chicago, Milwaukee and St. Paul Railway Company, at the request of the Chicago and Pacific Railroad Company, now proposes to aid the party of the first part in procuring a sufficient sum of money to redeem said property from the aforesaid sale, (referring to the sale to John I. Blair *et al.*), and to protect the said property from all *the aforesaid valid judgment liens, and also to extend and construct the road of this company to the Mississippi river*, and also to secure all proper and necessary terminal facilities, depots and grounds for the road, and also to relay that part of the road already constructed with steel rails, and to fully equip the road with all necessary rolling stock, the entire cost of which is estimated at $3,000,000, for which said companies propose to execute a joint and several bond. And that whereas the Chicago, Milwaukee and St. Paul Railway Company, at the like request of the Chicago and Pacific Railroad Company, proposes to take up, pay, cancel and satisfy all of said bonds at their maturity, and to meet, pay and satisfy all the accruing interest on said bonds as the same shall become due and payable, and shall save the said party of the first part harmless therefrom, and also to pay all taxes *charges* or assessments *imposed* or assessed, *or which may be imposed or assessed upon the property or premises of the Chicago and Pacific Railroad Company.* And whereas the said Chicago and Pacific Railroad Company has no means or resources out of which the necessary amount of money can be realized or provided for the redemption of its property from said sale in said decree, *and for the discharge of said judgment liens* and completion of its said railroad, and no pecuniary credit or ability to provide for the same, except by the aforesaid lease and

the execution of said mortgage or trust deed, together with the bonds to be secured thereby.

It was therefore resolved that the Chicago and Pacific Railroad Company execute a lease of all its property to the Chicago, Milwaukee and St. Paul Railway Company for a term of 999 years, with proper covenants on the part of the Chicago, Milwaukee and St. Paul Railway Company to keep and hold said Chicago and Pacific Railroad Company free and harmless from loss and damage on account of the bonds hereinbefore referred to, and from all taxes and assessments that may be levied upon or assessed against said property during the continuance of the said lease, *and for the preservation and restoration of said property.*

It was further resolved that the president and secretary of the company be authorized to execute a lease, bonds and mortgage and deliver the same *for the purposes aforesaid.* (Rec., 35, 38 and 42.)

On the first day of March, 1886, after argument, the court entered a decree against the Chicago, Milwaukee and St. Paul Company ordering it to pay within thirty days, a sum of money sufficient to satisfy the judgment, costs and interests rendered in favor of the Third National Bank against the Chicago and Pacific Railroad Company, including also the amount with interest paid by said bank to redeem from the sale to Albert Keep. (Rec., 55, 57.)

ARGUMENT.

Upon the foregoing statement it is submitted that the Third National Bank is entitled to relief upon any one of the following grounds:

I.

That there was a misappropriation by the Chicago, Milwaukee and St. Paul Railway Company in constructing the bridge crossing the Mississippi river of the trust funds raised by the joint mortgage upon the property of the Chicago and, Pacific.

II.

That the Chicago, Milwaukee and St. Paul Railway Company agreed as evidenced by the terms of the lease to pay the claim of Third National Bank.

III.

That the Chicago and Pacific and the Chicago, Milwaukee and St. Paul road are estopped from contesting the validity of the sale under the Tabor judgment.

IV.

That the bank acquired the right to sell the property of the Chicago and Pacific road under its execution against that company by virtue of the redemption proceedings under the Tabor judgment.

I.

As to the improper diversion of the trust fund. The circuit judge in rendering his decision, (a copy of which is attached to this brief, it having been omitted from the record), said: "It was estimated that the bonds would enable the lessee company to redeem from the foreclosure sale, pay all "existing judgment liens, complete the road to the Mississippi "river, relay a portion already in operation with steel rails, "procure necessary terminal facilities, depots, grounds, etc., "and fully equip the entire line.

"The fund arising from the sale of the bonds was to be "used for these and no other purpose. Any diversion of it "or any part of it to other objects or purposes was not permitted by the contract.

"The road was to be completed *to the Mississippi river, not "to and across the river.* If the entire proceeds of the bonds "had been expended in accordance with the terms of the lease, "the bank's debt for the money, which it lent to the Chicago "and Pacific company could not be asserted in law or equity "against the Milwaukee company, or the leased property in "its proportion. The record shows, however, that the latter "company did all that the terms of the lease obliged it to do, "except paying the Tabor judgment, and still have in the "treasury a sum sufficient to pay for constructing a bridge "across the Mississippi river. The amount due the bank, including the Tabor judgment, should have been paid out of "this surplus. The cost of the bridge is not shown by the "record, but we may safely assume that it exceeded the bank's "demand. The Milwaukee company contends that as lessees "it was entitled to the entire issue of bonds, and that any surplus remaining after making necessary expenditures in ful-

"fillment of its contract it could rightfully use in bridging the "Mississippi river, or in any other way for its own benefit. It "is admitted that the proceeds of the bonds paid for building "the bridge, and it is not shown that the Milwaukee company "expended the entire proceeds, or an amount equal thereto "in the manner and for the purposes specified in the lease.

"Mr. Edwin Walker, the sole witness in the case, is presi- "dent of the Chicago and Pacific company and general so- "licitor of the Milwaukee company. He testified that the "former company had no property but the leased property "which had greatly increased in value; that it was in receipt "of no income or earnings, that no separate account of the "earnings of the leased property had been kept, and that "while he did not know that he could furnish a statement of "the precise manner in which the proceeds of the bonds had "been expended, he knew the entire amount had been paid "out in redeeming from foreclosure sale, and *completing the "construction of the road to the Mississippi river, and in bridg- "ing the river*, and in purchasing rolling stock and terminal "facilities.

"The creditors of the Chicago and Pacific, whether holding "judgment liens or not upon the company's property when the "lease was executed, were entitled to payment out of any of "the remaining of the funds which remained in the treasury "of the Milwaukee company."

The finding of the court is abundantly sustained by the pleadings and proof. The charter of the Chicago and Pacific railroad authorized the construction of the road from the city of Chicago to the *Mississippi river, all lying in the State of Illinois.* (Rec., 2.) The lease also described the road as running from Chicago to the Mississippi river. (Rec., 42 and 44.)

The lease also provided that the money raised from the

bonds secured by the trust deed was to be used, among other purposes, to extend and construct the road of said party of the first part to the Mississippi river. That this money was otherwise used by the Chicago, Milwaukee & St. Paul Railroad Company cannot be disputed; on the contrary it is admitted. In the original bill, it is alleged (Rec., 4), that said lessee, the Chicago, Milwaukee & St. Paul Railway Company (by a typographical error the word is printed "lease" instead of "lessee") "*with the means provided by the execution of said last named trust* "*deed and bonds, and the proceeds of the sale thereof*, by and with "the consent of the Chicago and Pacific Railroad Company has "completed the construction of the entire road from the city of "Chicago to the Mississippi river, *and has also constructed a* "*bridge across the Mississippi river* at or near Savannah." This is the first admission of the wrongful use of the funds. Not only has the entire road authorized by the charter been completed, but the bridge across the Mississippi river, for which there is no authority, either in the charter or in the lease, has been built.

Again, Mr. Walker, who testified in behalf of the Chicago and Pacific Railroad Company, said (Rec., 31), "the whole "amount of $3,000 000 of bonds has been expended in the "completion of the road, *construction of a bridge across the* "*Mississippi river*, and in the purchase of rolling-stock and "terminal facilities." Again, when asked upon the cross-examination as to the value of the property or assets of the Chicago and Pacific company, he replied (Rec., 33): "I cannot "state its present value; its value has been largely increased "since the execution of the lease and mortgage, by the exten-"sion of the road, *the building of the bridge across the Missis-*"*sippi river*, and its connection with the Iowa lines of the Chi-"cago, Milwaukee and St. Paul. It now forms a part of the "through line between Omaha and Chicago."

Here Mr. Walker admits that the value of the road has been very largely increased by a number of causes, among which was *the building of a bridge across the Mississippi river.* After having stated that he could not tell what had been the net earning of the Pacific road since the execution of the lease and mortgage, he also said he did not think the earnings of the division had been kept separate at all; that he was sure that the earnings of the Chicago and Pacific line had not.

When further pressed for information as to the manner of the expenditure of the $3,000,000, and asked if he would furnish, or have furnished, such a detailed statement, he replied (Rec., 34): "I do not know whether I can obtain this state-"ment or not. I think it will be very difficult to furnish a de-"tailed statement for the reason that the entire track of the road "between Chicago and Byron has been practically relaid; and a "good deal of money has been paid out to procure title to the "right of way; also, there has been paid out a large amount "of money for fencing and improvement of the grade, that is "by cutting out steep grades, and the building of new station-"houses, and repairing the track generally.

"The road at the time of the sale, and at the time of the ex-"ecution of the lease, as a matter of fact, was not more than "half built, so that it had to be rebuilt. Then, in addition to "that, they extended the line from Byron to the Mississippi "river, *and built a bridge across the river, and the proceeds of* "*the bonds went into all that.* I do not think it would be possi-"ble for me to show in detail how the money was expended."

He was further asked if there was any one of the employes of the Pacific or Milwaukee road who could furnish a detailed statement, and replied: "I could not tell you that now; I could "ascertain." The record shows that no detailed statement was furnished, but by the pleadings and the sole witness in the case it is admitted that the bridge across the Mississippi was built with the proceeds of the bonds.

The diversion of the funds was successfully traced, and it is submitted, that the Milwaukee company is liable for the payment of both judgments, or that the bank has a lien upon the bridge for the payment of its judgment as well as for the Tabor judgment.

It appears almost unnecessary to cite authorities in support of the principle contended for, and it is done only that the position of appellees may be fully understood. The proceeds derived from the sale of the bonds constituted a trust fund, which was to be used only in accordance with the terms of the lease.

The Milwaukee company acted in a fiduciary capacity, and by diverting the funds was guilty of a breach of trust. The money having been confessedly used in the construction of the bridge, the Milwaukee company should pay both judgments or the bank should be declared to have a lien upon the bridge for the payment of the judgments. The money did not belong to the Milwaukee company. It could not have been reached by any creditor of that company. The Milwaukee company perverted it. It perverted its use from the manner in which it was to be expended. That company had as much right to use the funds in building a bridge across the Hudson or St. Lawrence rivers as across the Mississippi.

In *Case* v. *Beauregard*, 101 United States, 688, this court held, that whenever a creditor has a trust in his favor or a lien upon property for the debt due him, he may go into equity. In the above case the following authorities were cited:

Toppan v. *Evans*, 11 N. H., 311.
Holt v. *Bancroft*, 30 Alabama, 193.

The same principle was held in

Case v. *Beauregard*, 99 United States, 119.

The Supreme court of Illinois in *Hopkins* v. *Granger*, 52

Ill., 504, said: "It is one of the oldest heads of chancery "jurisdiction to execute and control trusts and trust funds." In that case the court held that the maker of a promissory note has his remedy in chancery in case of a misapplication of the money realized by the sale under the trust deed by there being a less sum credited upon the debt than the property was sold for. The same court also held in *Board of Supervisors of Henry County* v. *The Winnebago Swamp Drainage Co.*, 52 Ill., 454, that it would not permit the trust fund to be wasted and misapplied, the trust remaining unexecuted by the grantees, and they having sold a portion of the lands and divided the residue among themselves, the court will take the trust in charge and restore the fund to the former trustees to be by them applied in the execution of the trust. The grantees having violated the contract in respect to the trust it should be rescinded and they required to account for the fund. Again in *Constant* v. *Matteson*, 22 Ill., 557, the court said when a debtor conveys property to a trustee for the payment of his debt he then appropriates the property to that specific purpose, and if the trustee fails or refuses to so apply it, a court will compel him to appropriate it to the purpose designed.

Renfrew v. *Pearce*, 68 Ill., 125.
Phillips v. *Stone*, 25 Ill., 73.
Norton v. *Hixon*, 25 Ill., 439, 456.

In the latter case the court quotes from Story's Equity Jurisprudence, section 695, as follows: "Where a trustee or other "person standing in the fiduciary relation makes a profit out of "any transaction within the scope of his agency, or authority, "that profit will belong to his *cestui qui trust*, for it is a construc- "tive fraud upon the latter to employ that property contrary to "the trust, and to retain the profit of such misapplication, and by "operation of equity the profit is immediately converted into "a constructive trust in favor of the party entitled to the ben-

"efit, nor is the doctrine confined to trustees strictly so-called. "It extends to all other persons standing in a fiduciary relation "to the party whatever that relation may be."

In *Mechanics Bank of Alexandria* v. *Seton* 1st. Peters *309, the court said, it is a well settled rule that all persons coming into the possession of trust property with notice of the trust shall be considered as trustees. Trustees are bound with respect to that special property to the execution of the trust.

In *National Bank* v. *Insurance Co.*, 104 United States, 54, this court held as long as trust property can be traced and followed, the property into which it has been converted remains subject to the trust; and if a man mixes trust funds with his, the whole will be treated as trust property, except so far as he may be able to distinguish what is his. The doctrine applies in every case of trust relation. See also:

Cook v. *Tulles*, 18 Wallace, 332.

Ruthum v. *Union Pacific Co.*, 17 Federal Reporter, 480.

In *Watson* v. *Seligman*, 13 Federal Reporter, 416, the court says, "when by any dealings between the corporation "and its stockholders the capital stock which is a fund for the "payment of its debts is wrongfully diverted, a creditor can "reach it upon the same theory that he can pursue property "of an ordinary debtor transferred in fraud of creditors. A "court of equity assists him, not in the exercise of its jurisdic- "tion over trusts, but in the exercise of its auxiliary jurisdiction "in behalf of its creditors. Such assets as are pursued here "are commonly spoken of in the books as a trust fund for the "creditors of the corporation and they are such in the sense "that a court of equity will lay hold of them, and impress "them with a trust in favor of creditors."

In 23 Howard, *Peacock* v. *Coe*, 129, the court said:

"We think it very clear if the company after having "raised money upon the bonds and given a mortgage "security had undertaken to divert the fund from the purpose "to which it was devoted, namely, the construction of the "road and its equipment, and upon which the security mainly "depended, a court of equity would have interposed to enforce "a specific performance. One of the covenants was, that the "money should be faithfully applied to the building of the "road, or if after the road was put into operation the company "had undertaken to divert the rolling stock from the use of "the road, a like interposition might have been invoked in "order to protect the security of the bondholders.

In Story's Equity Jurisprudence 465, and note, and also in section 468, the author says, "upon similar grounds as an agent "is bound to keep the property of his principal distinct "from his own, if he mixes it up with his own, the "whole will be taken both at law and in equity to be "the property of the principle until the agent puts the "subject-matter under such circumstances that it may be dis- "tinguished as satisfactorily as it might have been before the "unauthorized mixture on his part. *In other words the agent "is put to the necessity of showing clearly what part of the "property belongs to him, and so long as he is unable to do "this, it is treated as the property of his principal.* Courts "of equity do not in these cases proceed upon the notion that "strict justice is done between the parties, but upon the "ground that it is the only justice that can be done, and that "it would be inequitable to suffer the fraud or negligence of "the agent to prejudice the rights of his principal." 2 Lewin on Trusts, 892; 2 Perry on Trusts, 835 and 836; Story's Equity Jurisprudence, § 623.

These authorities might be multiplied, but they are sufficient to establish the claim of appellees, viz: that the Milwaukee

company should pay both jndgments or that the bank should be declared to have a first lien upon the bridge for the payment of the judgments.

II.

That there was an express agreement by the Chicago, Milwaukee and St. Paul company, as evidenced by the lease, to pay the claim of the bank.

When the lease was executed, the suit of the bank against the Chicago and Pacific company was pend'ng. The suit was commenced February 19, 1880, and the lease was executed April 2, 1880. The time of making the lease and the stipulations which it contains conclusively show it was designed by both companies that provision should be made not only for the claim of the bank, but for all claims and judgments against the Chicago and Pacific company. The lease provided that, "whereas certain other parties to whom said company (referring to the Chicago and Pacific Company) was so aforesaid indebted, *have prosecuted their several demands* in the Superior and Circuit courts of Cook county, and *other courts in the State of Illinois*, and have procured divers judgments thereon, which now remain unpaid and unsatisfied of record and are liens upon the property of said party of the first part, and *other of said demands still remain unliquidated*." And that whereas the Chicago, Milwaukee and St. Paul Railway Company, at the request of the Chicago and Pacific Railway Company, now proposes to aid the party of the first part in procuring a sufficient sum of money to redeem said property from the aforesaid sale, and *to protect the said property from all the aforesaid valid judgment liens*." (Rec., 43.)

These provisions unquestionably refer to the claim of the

bank. The claim of the bank was one of the demands which was being "prosecuted," and which was "still unliquidated" that is, it was not reduced to judgment. It was evidently the intention to pay not only the judgments which had been rendered, but also the "unliquidated demands" which might be reduced to judgment in those cases where suit had been commenced or prosecuted. The object was "to protect the prop-"erty from *all* the aforesaid valid judgments.".

That this was the intention, is even made more apparent by another provision. The lease was made by the Chicago and Pacific company in consideration of one dollar "and of the premises aforesaid," and of the agreement specified thereafter. One "of the premises aforesaid" was that the Milwaukee company was "also to pay all taxes, *charges* or assess-"ments *imposed*, or *which may be hereafter imposed* or assessed "upon the property" *of the Pacific company*. (Rec., 43–44.)

An inspection of the lease demonstrates not only that a fund was to be raised which would pay and extinguish all of the indebtedness of the Chicago and Pacific Company, but it also shows that the Milwaukee company was to pay the bonds and interest thereon, and all taxes, *charges* or assessments. The Chicago and Pacific road was to be free and unembarrassed of all claims. This construction is in harmony with the purposes of the lease and resolutions. The Pacific company conveyed all its property to the Milwaukee company in consideration of the latter company doing certain things. The Milwaukee company not only agreed to use the trust funds according to the agreement, but also agreed to pay the bonds at their maturity and interest thereon as it accrued, and all the taxes, assessments, and "all charges." These items were not to be paid out of the trust fund, but out of the treasury of the Milwaukee company presumably from its earnings and income, either from its own road or the Pacific company or from both jointly. The Mil-

waukee Co. assumed an additional liability in agreeing to pay all "charges." It is not pretended that the Milwaukee company did not know of the bank's claim at the time of the execution of the lease. The suit was pending, and the Milwaukee company was charged with notice. The claim of the bank is included in the "charges" which the Milwaukee company *was to pay*. The word means the Milwaukee company agreed to pay whatsoever lien, encumbrance, judgment or execution that might be a charge, or might be imposed upon the property. That was a part of the consideration of the lease. The agreement gave the bank a right of judicial process against the Milwaukee company in case of non-payment.

Herzey v. *Illinois Midland Co.*, 28 Fed. Rep., 170.

By the judgment in favor of the bank, the property of the Pacific company was charged with its payment, and the Milwaukee company accepted the property thus charged and agreed to pay the same.

Bouvier defines "charge" as "any obligation binding upon "him who enters into it, which may be removed or taken "away by a discharge." "An obligation which a testator "imposes upon his devisee, as if the testator gave Peter black "acre and directed that he should pay John during his lifetime "an annuity of one hundred dollars which shall be a charge "on said land."

Stimson's Law Glossary, page 58, defines charge first: "A "burden, encumbrance or lien, as when land is charged with "a debt. Second, a claim, demand."

Rapalje and Lawrence's Law Dictionary, page 198, defines the word as follows: "In its general sense a charge is an "obligation or liability. Second, more frequently, however, "charge is applied to property, and signifies that it is security

" for the payment of a debt or performance of an obligation. " It is a general term and therefore includes mortgages, liens, " writs of execution, etc.; but it is also applied in a restricted " sense to cases where the security is not specially named, and " where there is not necessarily a personal debt. Thus, if the " owner of land agrees that the rent shall be security for a " debt or obligation by himself to another person, that will " charge the land. The principal effect of such charge is to " entitle the grantee to take proceedings to obtain a sale of " the property charged."

Cothran's Students' Law Lexicon, page 55, defines " charge " as a duty or obligation imposed upon some person, or a lien, " encumbrance or claim to be satisfied out of a particular " estate."

In the case of *Griggs* v. *Bank*, 59 Alabama, 317, the word " charge " is said to be of very large signification. Its proper signification is every lien or encumbrance or claim the purchaser may have upon the premises and for which at law or in equity he would be entitled to hold the lands as security to the satisfaction of which a court of equity would condemn it.

In *Gordon* v. *McCulloh*, 66 Maryland, 248, when the grantees in consideration of the execution and delivery of the deed to " *discharge all encumbrances upon or claims against the said* " *lands*," the court said " this language seems to be sufficiently distinct. There were incumbrances and the claims " resting on the lands, and these it was desired to remove, so " that they might be sold with the advantage of a clear title. " The debts alleged to be due to the complainant were merely " simple contracts, and in no respect 'incumbrances upon or " claims against' the lands. These expressions import liens which " *propria vigore* bind the realty; which fasten upon it and " follow it into the hands of all purchasers, who take it with " notice of their existence; and which may be enforced by a

"sale of the property. They are called 'incumbrances,' be-
"cause they rest as a burden on the title until they are re-
"moved by payment or release; they are described as '*claims*
"*against the land*,' because the land is the debtor and may be
"sold to discharge the debt, without regard to the personal
"liability of the owner."

The word "lien" in its common acceptation is understood and used to denote a legal claim or *charge* on property, either real or personal, for the payment of any debt or duty, although the property be not in the possession of him to whom the debt or duty is due.

Dozmer v. *Brockett*, 21 Vt., 602.

The case of *Ketchum* v. *St. Louis*, 11 Otto, 306–309, is an instructive case to show to what extent the court will enforce liens. The court said: "In *Legard* v. *Hodges* Lord THUR-
"LOW said: 'I take this to be a universal maxim, that wherever
"persons agree concerning any particular subject, that, in a
"court of equity, as against the party himself, and any claim-
"ing under him voluntarily, or with notice, raised a trust.
"These persons have so claimed, and, therefore, this is a pure
"trust estate, and they must be declared trustees.' 1 Ves., Jr.,
"478. In the report of that case in 3 Bro. C. C., 531, the
"Chancellor says: 'I take the doctrine to be true, that when
"parties come to an agreement as to the produce of land, the
"land itself will be affected by the agreement.'" Upon hear-ing the former decree was affirmed. 4 *id.*, 422.

In re Strand Music Hall Company (3 De. G., J. & S., 147), the question arose whether that company had created a valid charge on their real property. "There can, I think," said Lord Justice TURNER, "be no doubt that it was intended by
"these agreements to create a charge upon the property of
"the company, but it was said on the part of the official liqui-

"dator that this intention was not well carried into effect. I "apprehend, however, that where this court is satisfied that it "was intended to create a charge, and that the parties who in- "tended to create it had the power to do so, it will give effect "to the intention, notwithstanding any mistake which may have "occurred in the attempt to effect it."

The doctrine is thus stated by Mr. Justice STORY in his Equity Jurisprudence, Vol. II, Sec. 1,231: "Indeed, there is "generally no difficulty in equity in establishing a lien, not only "on real estate, but on personal property, or on money in the "hands of a third person, wherever that is a matter of agree- "ment, at least against the party himself, and the third persons "who are volunteers or have notice; for it is a general princi- "ple in equity that as against the party himself, and any claim- "ing under him voluntarily or with notice, such an agreement "raises a trust." The author cites, in support of these views, *Legard* v. *Hodges*, *supra*.

So, also, in *Pinch* v. *Anthony and others*, 8 Allen (Mass.) 536: "It is well stated that a party may, by express agree- "ment create a charge or claim in the nature of a lien on real "as well as personal property of which he is the owner or in "possession, and that equity will establish and enforce such "charge or claim, not only against the party who stipulated to "give it, but also against third persons who are either volun- "teers, or who take the estate on which the lien is agreed to "be given, with notice of the stipulation. Such agreement "raises a trust which binds the estate to which it relates, and "all who take title thereto with notice of such trust can be "compelled in equity to fulfil it."

In the recent work of Mr. Jones on Mortgages (Vol. I, Sec. 162) the author remarks: "In addition to these formal in- "struments which are properly entitled to the designation of "mortgages, deeds, and contracts, which are wanting in one

"or both of these characteristics of a common-law mortgage, "are often used by parties for the purpose of pledging real "property, or some interest in it, as security for a debt or ob-"ligation, and with the intention that they shall have effect as "mortgages. Equity comes to the aid of the parties in such "case, and gives effect to their intentions. Mortgages of this "kind are therefore called equitable mortgages." So, also, in his treatise on railroad securities, page 57, the same author says: "An agreement of a company to set apart specific "earnings or property in the hands of a third person to meet "the interest or principal of its bonds, creates an equitable lien "or charge." Willard, Eq. Jur., 462; *Watson* v. *The Duke of Wellington*, 1 Russ. & Myl., 602; *Yeates* v. *Groves*, 1 Ves., Jr., 279; *Lett* v. *Morris*, 4 Sim., 602; *Ex parte* Alderson, 1 Madd., 39.

Further citation of authority would seem to be unnecessary. If any doubt exists as to the case coming within these recognized principles of equity, it is sufficient to say that the appropriation of the earnings of the railroad company as security "for the loan by the county was in pursuance of a special act "of the legislature; and in sustaining the decree below we give "effect to the legislative will as to matters over which its au-"thority unquestionably extended."

III.

The Chicago and Pacific and the Chicago, Milwaukee and St. Paul roads are estopped from contesting the validity of the sale under the Tabor judgment.

It is claimed upon the part of the bank that at the time of the execution of the lease by the Chicago and Pacific Railroad Company to the Chicago, Milwaukee and St. Paul company, and the execution of the joint mortgage by the said compa-

nies, to wit: April 2, 1880, the Tabor judgment had been rendered and kept alive by the issuing of executions, and that the Milwaukee and St. Paul company therefore took the lease from the Chicago and Pacific company, and the bondho'ders of the joint mortgage took the bonds subject to the Tabor judgment. The question is therefore presented whether the Third National Bank, by virtue of its redemption proceeding, is not subrogated to the rights of the Tabor judgment? To this we say the Chicago and Milwaukee company, as well as the Chicago and Pacific company, are estopped from denying the validity of the levy under the Tabor judgment, those companies having seen execution after execution issue upon the property without objection. They have seen the sale of the property to Keep without any attempt having been made to restrain it, nor any attempt having been made to set it aside. On the contrary the companies had, by their action in the premises, ratified the sale to Keep and the redemption by the bank. They should not now be permitted to dispute the validity of the sale and the redemption proceedings.

The certificate issued by the United States marshal to Keep was purchased by Mr. Mitchell, then the president of the Chicago, Milwaukee and St. Paul company. Mr. Mitchell paid therefor the sum of $5,207.66. (Rec., 39.) For whom was the purchase by Mitchell made? Must it not have been made in behalf of the Chicago and Pacific company or the Chicago, Milwaukee and St. Paul company, or for some one in the interest of those roads? As the president of the Milwaukee company, it is obvious he did not make the purchase for himself. He was prohibited from so doing.

Another element of ratification is the receipt of the redemption money paid by the Third National Bank by Mr. Mitchell through his attorney Mr. Walker, who was then also the president of the Chicago and Pacific Railroad Company and one

of the attorneys of the Chicago, Milwaukee and St. Paul company. (Rec., 39.)

In *Carwell* v. *Moconkey*, 5 Penn. St. Rep., 168, the court held the receipt of the purchase money by the judgment-creditors with the permission of the insolvent trustee of defendant is equivalent, in confirming the sale, to a receipt by himself; for they are his *cestui que trust*.

The Chicago and Pacific not having redeemed or filed a bill to set aside the first sale under the Tabor judgment is now, therefore, estopped, both from denying the validity of the sale or filing a bill to enjoin the present proposed sale by the United States marshal. It is difficult to conceive what more it could have done for the purpose of ratification. Its conduct has been such as to induce any reasonable person to believe that the sale was valid.

In *Holmes* v. *Steele*, 28 N. J. Eq., 173, the court held, when a defendant stands by and permits the sheriff to sell several lots of land as one tract without objection, he cannot afterwards object because they were not sold in parcels.

In *Lucas* v. *Hart*, 5 Iowa, 415, the court said: if one knowingly, though he does it passively by looking on, suffers another to purchase and expend money on land under an erroneous opinion of title without making known his claim, he shall not afterwards be permitted to assert his legal rights against such person.

Again in *Austin* v. *Lawrence*, 63 Mo., 19, the court held, where the defendant in the execution, knowing of a defect in service on him in the original suit, stands by at the sale and not only permits his land to be sold in satisfaction of his debt, but demands and receives the surplus of the proceeds, he is estopped from laying claim to the land, and the purchaser will be protected if the proceedings are regular.

See also

Turner v. *Watkins*, 31 Ark., 429–449.
City of Magnoketa v. *Willey*, 35 Iowa, 323.

In *Morgan* v. *Railway Co.*, 96 U. S., 720, the court said: "The appellee insists that the record discloses a case of estoppel *in pais*, and that the appellant is thereby barred from "maintaining the claim which he seeks to enforce in this litigation. The principle is an important one in the administration of the law. It not unfrequently gives triumph to right "and justice where nothing else could save them from defeat. "It proceeds upon the ground that he who has been silent as "to his alleged rights when he ought in good faith to have "spoken, shall not be heard to speak when he ought to be "silent. *The Bank of the United States* v. *Lee*, 13 Pet., 107.

"He is not permitted to deny a state of things which by his "culpable silence or misrepresentations he had led another to "believe existed, and who has acted accordingly upon that "belief. The doctrine always presupposes error on one side "and fault or fraud upon the other, and some defect of which "it would be inequitable for the party against whom the "doctrine is asserted to take advantage." *Merchant's Bank* v. *State Bank*, 10 Wall., 604.

The rule has been settled in Illinois, where this case arose, in accordance with these views. In *Baker* v. *Pratt*, 15 Ill., 568, the court said: "A verbal statement is sufficient, where "the party has made an admission which is clearly inconsistent "with the evidence he proposes to give or the title or claim "which he proposes to set up, and the other party has acted "upon the admission, and will be injured by allowing the "truth of the admission to be disproved." In the case of *Mills* v. *Graves*, 38 Ill., 255, it was said: "Where a party "stands by and sees another acting to his injury, and the owner "declares that he has no claim, equity will not permit him

"afterwards to assert his title to the injury of the person he "has thus misled." See, also, *The People* v. *Brown et al.*, 67 Ill., 435; *Knoebel* v. *Kircher*, 33 *id.*, 308; *Smith* v. *Newton*, 38 *id.*, 230; *International Bank* v. *Bowen*, *id.*, 541; and *Higgins* v. *Ferguson*, 14 *id.*, 269.

In *Close* v. *Glenwood Cemetery*, 107 U. S., 466, it was held that the person acting as president of a corporation cannot deny its organization and acceptance of charter. The court said, page 477, "one who deals with a corporation as existing "in fact is estopped to deny as against the corporation that it "has been legally organized. And in a court of equity, at "least, the owner of land, who stands by and sees it conveyed "as belonging to another cannot afterwards set up his own "title against the grantee."

Thomas v. *Hammond*, 1 Edwards' Ch., 497–506.

IV.

That the bank acquired the right to sell the property of the Chicago and Pacific Railroad Company under its execution against that company by virtue of the redemption proceeding under the Tabor judgment.

We submit that a railroad company, independently of its franchise, can be sold, and that the course pursued by the bank was the proper one. The statutes of Illinois provide that redemption can be made. (Starr & Curtiss' Annotated Statutes, Ch. 77, Sec. 20, p. 1398.) All the provisions of the statute have been complied with. By the redemption from the sale by Keep, the Third National Bank is substituted to all the rights that Horace Tabor, the judgment creditor, originally acquired. What were those rights? A lien upon the real estate for seven years from the rendition of the judgment. (Starr & Curtiss' Statutes of Illinois, Ch. 78, Sec. 1, p. 1379.)

Judgment was rendered before the foreclosure proceedings on the first mortgage were commenced. Subsequently the title became vested in the Chicago and Pacific Railroad Company by redemption from sale under said foreclosure proceedings to Mr. Blair, and when the lease of the Chicago and Pacific Company to the Chicago and Milwaukee Company, and the joint mortgage of both companies were executed, the Tabor judgment was a lien upon the entire property of the road. By the redemption proceedings the bank, therefore, has a lien prior to the joint mortgage and prior to the lease of the Chicago and Pacific road to the Chicago and Milwaukee company. The bank is entitled to the fruits of its superior vigilance. The lessee and bondholders took with notice of the Tabor judgment, and they were bound to know that there was a possibility of redemption proceedings. The suit of the bank was instituted before the execution of the lease and joint mortgage. The Circuit court judge stated the facts clearly. He said: "The Tabor judgment was taken in this court be- "fore the foreclosure suit was commenced, and it was a valid "lien upon the property of the Chicago and Pacific company, "within the meaning of the lease, when that property was "surrendered to the Milwaukee company. It was necessary to "redeem from the foreclosure sale, and thus get rid of the lien "of the trust deed executed in 1872, and decree foreclosing it, "before executing the lease and the joint bonds, and the trust "deed to secure them. The Tabor judgment was a lien, sec- "ond only to the lien of the foreclosed deed, and when that "lien was discharged, as it certainly was, by the payment and "acceptance of the redemption money, the Tabor judgment, "so far as the pleadings and testimony show, stood as the first "lien."

To further show the right to sell the road independently of its franchises we refer to the provisions of the statutes of Illinois

which makes judgment liens upon the real estate of persons against whom they are obtained for the period of seven years. Starr and Curtiss' Stat., Chap. 77, § 1, p. 1,379.

Under Chap. 131 § 5, of the Ill. Stat., Starr and Curtiss, p. 2,331, it was provided, "that the word person may extend and "be applied to bodies politic and corporate as well as individuals."

By other references it will appear that it was not the intention of the legislature to prevent the sale of the real estate of a railroad. By Sec. 10, Art. 11, Constitution of Ill., adopted 1870, (Starr and Curtiss' Stat., 162,) it is provided that "The "rolling stock and all other movable property belonging to "any railroad company, or corporation in this state, shall be "considered personal property, and shall be liable to execution "and sale in the same manner as the personal property of individuals, and the general assembly shall pass no law exempting any such property from execution and sale."

If it is asked why it was necessary for the legislature to provide that all movable property of the railroad company should be considered personal property, the answer we think is found in the case of *Palmer* v. *Forbes*, 20 Ill., 301 and 310, where the court states that, "It is of the opinion that rolling stock, "rails, ties, chairs, spikes, and all other material brought upon "the ground of the company encumbered by a mortgage and "designed to be attached to the railroad shall be considered as "part of the realty and encumbered by the mortgage as "such."

This was before the adoption of the present constitution. Rolling stock, under the decisions of the Supreme court of Illinois, prior to the adoption of the constitution of 1870, was considered as realty. The present constitution changes the rule formerly in force. The case of *Scott* v. *Clinton Spring-*

field Company, 6 Bissell, 524, recognizes this change. Thus, by the constitution of the state, the personal property of a railroad is placed upon the same footing as any other personal property. There is no provision of the statute exempting the real estate of a railroad from a sale under an execution issued upon a judgment obtained before the execution of a mortgage upon the property of a railroad. The claim of creditors obtaining a judgment and execution before the property is mortgaged is superior to the claim of the mortgagee. Rolling stock is just as necessary for the operation of a road as the track and real estate levied upon, and if the rolling stock is not exempt from execution there seems to be no good reason why the real estate should be exempt. The rolling stock can be sold separate from the franchise. The sale of the rolling stock separate from the franchise would not cause greater injury than the sale of the real estate separate from the franchise.

Again, in Chap. 83, §§ 51 to 56, Starr and Curtiss' Stat., 1533, under the subject of liens, the legislature has provided for the sale under execution of all property, real, personal and mixed, of a railroad corporation to satisfy claims of contractors, sub-contractors and laborers. If the suit is commenced in any court having jurisdiction, execution shall issue, as in other cases. If the execution issued on a judgment obtained before a justice of the peace shall be returned not satisfied, a transcript of the judgment may be filed in the Circuit court, and the judgment shall have all the force and effect of a judgment obtained in the Circuit court, *and execution issue thereon as in other cases.*

Again, in the cases cited, at the hearing, by counsel for the Chicago and Milwaukee company, objection was made to a sale of the real estate without the franchise; that the one without the other would be worthless.

This objection to selling the property without the franchise is

obviated by the act providing for the incorporation of railroads.

In § 1, Chap. 114, Starr and Curtiss' Stat. of Ills., 107, it is provided, "that any number of persons not less than five, may become an incorporated company for the purpose of constructing and operating any railroad in the state, and that any and all railroads or transportation companies authorized to be incorporated and transact business in this state by virtue of this act, shall be, and they are hereby authorized and empowered to purchase, own, operate and maintain any railroad sold or transferred *under order* or powers of sale, or decree of, or sale under, foreclosure of mortgage or deed of trust."

Under this provision, if the property of the Chicago and Pacific company, which had been levied upon, had been sold by the U. S. marshal under the execution writ, a company could at once be incorporated to operate and maintain the road. The old charter would not have been necessary. This is confirmed by the testimony of Walker, the counsel of both companies. He was asked (Rec., 33): "What is the value of the franchise of the Chicago and Pacific company?" He replied: "I don't think it has any practical value at all disconnected from the property of the company, *as you can organize under the statutes for four dollars or five dollars, a company having the same franchise.*"

We think the case of *Hammock* v. *Loan and Trust Company*, 105 U. S., 91, is very different from the present. There the court says: "All that we do decide is, that by the laws of Illinois, the real estate, franchises and other property of a railroad company, mortgaged as an entirety, may be sold as an entirety under the decree of a court of equity, without any right of redemption in the mortgagor, or any judgment creditors as to such real estate."

In the present case an entirely different question has been presented. Judgment was rendered and the property was sold under the execution, and redemption was made by a judgment creditor. The Hammock case does not hold that railroad property cannot be sold under execution. It holds, that the provision of the state constitution has partially modified the general rule, that the property of a railroad corporation used for necessary railroad purposes cannot be seized and sold under execution.

The court says: "When the mortgage of April 12, 1871, "was executed, there was no levy upon the movable property "of the company, and consequently the rights of the mort- "gagee were superior to the lien arising from a subsequent "levy by execution upon the movable property."

In the present case, execution in the Tabor judgment was issued September 9, 1876. The sale under the decree of foreclosure of the Blair mortgage was made May 1, 1879, and the lease and mortgage were executed April 2, 1880. Consequently the lien of the Tabor judgment was superior to the lease and mortgage.

In Illinois the property liable to execution is, "all and singu- "lar the lands, tenements, real estate, goods and chattels" (except such as is by law declared to be exempt), "of every "person against whom any judgment has been or shall here- "after be obtained in any court of record for any debt, dam- "age, cost, or other sum of money, shall be liable to be sold "upon execution to be issued upon such judgment."

Chapter 77, § 10, Starr & Curtiss Statutes, page 1,388.

The statutes of Ohio relating to lien of judgment do not appear to be materially different from those of Illinois. In *Jeffrey* v. *Moran*, 101 United States, 285, it was decided, con-

struing the Ohio statute, where the statute provided a judgment against a railroad should be superior to its mortgage, and judgment was rendered after sale under foreclosure that the judgment was not a lien on the fund.

If the judgment had been rendered before the execution of the mortgage, it is evident the court would have decided that it was a superior lien, and if so, it must be entitled to all the rights which flowed from it. This is what we claim for the Tabor judgment and the redemption proceedings under it.

The case of *Gue v. Tide Water Canal Company*, 24 Howard, 257, is very different from the one under consideration. There the marshal seized and had for sale a house, sundry canal locks and wharf and sundry other locks.

The court, in affirming the action of the Circuit court in granting an injunction to restrain the marshal from selling the property levied on, said (p. 263):

"The property seized by the marshal is of itself of scarcely "any value, apart from the franchise of taking toll, with which "it connected in the hands of the company, and if sold under "this *fieri facias* without the franchise, would bring scarcely "anything: but would yet, as it is essential to the working of "the canal, render the property of the company in the "franchise, now so valuable and productive, utterly value-"less.

"Now, it is very clear that the franchise or right to take toll "on boats going through the canal would not pass to the pur-"chaser under this execution. The franchise being an incor-"poreal hereditament cannot, upon the settled principles of the "common law, be seized under a *fieri facias*. If it can be "done in any of the states, it must be under a statutory pro-"vision of the state: and there is no statute of Maryland "changing the common law in this respect. Indeed, the mar-

"shal's return and the agreement of the parties shows it was "not seized, and consequently, if the sale had taken place, the "result would have been to destroy utterly the value of the "property owned by the company, while the creditor himself "would, most probably, realize scarcely anything from these "useless canal locks and lots adjoining them."

In the present case the property seized was the entire property of the Chicago and Pacific road. It cannot be said therefore, respecting it that, "if the sale had taken place, the "result would have been to destroy utterly the value of the "property owned by the company, while the creditor himself "would most probably realize scarcely anything."

See also,

State v. *Rives*, 5 Iredell, 297.
Doe ex dem. Haydenfeldt v. *Mitchell*, 6 Ala., 70.
McCaskle v. *Amarine*, 12 Ala., 22.
Junction R. R. Co. v. *Ruggles*, 7 Ohio St. R. 1, 7.
P. & B. C. R. R. Co.'s Appeal, 70 Penn St., 355.
Coe v. *Johnson*, 18 Ind., 218.
Talbott v. *Hale*, 72 Ind., 1.
Eells, Trustee etc., v. *Johann, Shf.*, 27 Fed. Rep., 327.

In the case of *Ludlow, Trustee*, v. *Clinton Line Railway Company*, (1st Flippin, 25), it was held that a judgment against a railroad corporation becomes a lien upon its road and realty in the same manner as upon the real estate of a natural person. In this case the court said:

"What effect the court would have given to Hilliard's judgment had it been obtained previous to the execution and recording of the mortgages, we are left to conjecture from what

is said in another part of the same opinion. The learned judge says: It may be true that a railroad corporation holds its property in a certain sense, as a public trust to answer the purpose of a public highway for the transportation of persons and property. But it is consistent with that public trust to contract obligations. Indeed, the very exercise of the trust necessarily involved obligations to individuals, and to meet these obligations the property of the corporation must in some form be liable. The question is, in what form? Shall it be in the ordinary legal form applicable to the property of individuals, or shall peculiar rules be introduced, which may have the effect to delay creditors and operate as a shield to protect property from their just demands?"

Again the court said: We are satisfied that it is not the policy of the state, nor just to individuals, that the power of a court should be invoked to enable an insolvent corporation to operate a railroad by protecting its property from the claims of creditors, of those who have performed for its labor, or have suffered loss or sustained injuries by the misconduct of its agents. We think the true policy of the state requires, that just demands should be met, and that the property of those against whom they exist, should be applied for the purpose.

"The Supreme court of Ohio, in the case referred to, fully "approve of the well-established principle, that the mere "grant to a body corporate, in the absence of any restriction, "gives the right to acquire and dispose of real estate; and in "such case a corporation may be regarded as occupying the "position of an individual owner of land. There is the same "voluntary alienation and a like liability to involuntary alien-"ation. What a corporation can convey its creditor may "subject.

"We can see nothing in the railroad policy of the state, as "interpreted by the Supreme court, or in the act of May, 1852,

"which should exempt from judgment liens, the lands and "road owned by the Clinton Line Railroad Company.

"Its power to pledge lands, by way of mortgage to pay cred- "itors, implies the right of a creditor to subject such lands, "by legal proceedings, to the payment of its debts. The law "of its charter confers the power to acquire lands, and the "same to hold and convey in such manner as the directors "may prescribe. The power to convey is without any re- "striction as to the mode or purpose. In that respect the "corporation has all the freedom of action which belongs to "natural persons. Its power of alienation, therefore, whether "voluntary or involuntary, should be subject to the inci- "dents which attach to individuals.

"With this view of the case, we are clearly of the opinion "that the lands and road of the Clinton Line company are "subject to the operation of the general laws of the state, "which law declares, that the lands and tenements of the judg- "ment-debtor shall be bound for the satisfaction of the judg- "ment."

We also refer the court to *Railroad Company* v. *Chamberlain*, 6 Wallace, 748.

Railroad Company v. *James*, 6 Wallace, 750 and 752.

Respecfully submitted.

JOHN H. THOMPSON, *Of Counsel.*

HUNTINGTON W JACKSON, *Solicitors.*

CIRCUIT COURT OF THE UNITED STATES, NORTHERN DISTRICT OF ILLINOIS.

Chicago and Pacific Railroad Company
vs.
Third National Bank of Chicago *et al.*

OPINION BY BLODGETT, J.

On the preliminary hearing in this case an injunction was granted, but with leave to the defendant to move to set it aside at any time after the expiration of twenty days.

The decision of the Supreme court in the case of *Hammock v. Farmer's Loan and Trust Company*, not yet reported in the Federal courts, but the opinion of which I have here, is so distinctly and emphatically against the right of a judgment creditor to sell a railroad or railroad property under an execution at law, that I cannot doubt but what the remedy of the judgment creditor in this case, who is the defendant in the suit, must be worked out in some other way than by sale under an execution. Recognizing the general and almost trite principle of a court of equity that "he "who seeks equity must do equity," I have no doubt but when the complainant comes into this court and asks relief against the exercise of the right of sale under execution, it should be prepared to show some way in which the execution creditor may be paid, or satisfied, the amount of the indebtedness shown to be due. The court may, perhaps, adopt one of two methods—I simply make these suggestions for the consideration of counsel—the court could, perhaps, arbitrarily say, it would not continue this injunction in force, unless the complainant would furnish a bond, or security, for the payment of this debt within some reasonable time. Another

method would be for the defendant to file a cross bill and ask that the railroad property be placed in the hands of a receiver for the purpose of working out the payment of this indebtedness through the earnings of the railroad, which could be impounded in court through a receiver, for that purpose.

The bill in this case discloses the fact that this railroad is leased to the Chicago, Milwaukee and St. Paul Railroad Company, and therefore it is probable that no sale could be made, the judgment having been rendered since the lease was made, in any form that would defeat this lease. The bill, however, does not state the rental for which this road is leased, and the only question is whether the court shall exercise its arbitrary power by requiring a bond for the payment of the indebtedness as a condition on which to keep the injunction in force, or whether the defendant had not better file a cross-bill and ask for the appointment of a receiver. There are, perhaps, hardly facts enough before the court to show, although in the form of affidavit; we are not advised how much rental there is due, what the earnings of the road are, nor of any fact except that about the time the road was redeemed from the mortgage sale, made under decree of this court, the Chicago, Milwaukee and St. Paul Railroad Company advanced the money for the redemption, and under a contract by which they were to lease the road on which a mortgage was to be placed for the purpose of raising the means to effect the redemption and extend the road. That being stated in the bill, it is still left uncertain as to what the rental is, and also whether there may not be yet in the hands of one of these complainants, either the Chicago and Pacific Railroad Company or the Chicago, Milwaukee and St. Paul Railroad Company, assets with which to pay the indebtedness, growing out of the proceeds of these bonds, or some other means; and it

has occurred to me--I simply mention it for the consideration of the counsel—unless some settlement can be effected, whether the proper course would not be to file a cross-bill and ask for the appointment of a receiver.

Another complication, growing out of this view which I take of the law, in the light of the Hammock case, is, that the defendant in this case has redeemed this road from a sale made under another execution, rendered in favor of Dobbins and others, the Supreme court of the United States having decided that this property is not subject to sale or redemption under the redemption statutes of Illinois. It does appear, however, that the indebtedness due on the Dobbins judgment has been paid by the defendant in this case, to the amount of some $7,000, and I should be inclined to think that this defendant, having advanced the money, thereby relieving the railroad company of the embarrassment of having its property conveyed under that sale, that they would be placed in the same condition as a judgment creditor, not perhaps to have a lien, but to have their rights protected for the amount advanced, as well as for the money due on their own judgment. Counsel can indicate now what course they will pursue, or take time to consult.

OPINION BY GRESHAM, J.

The Chicago and Pacific Railroad Company was organized in 1865, to build a railroad from Chicago to the Mississippi river. In the prosecution of its enterprise the company contracted debts amounting to over $2,000,000. To raise money to pay this indebtedness, and to complete and equip its road, the company, on the first day of October, 1872, executed a trust deed or mortgage, embracing its property of every character and description, to secure an issue of $3,000,000 bonds, $2,000,000 of which were sold or delivered to creditors as

collateral security. Early in 1876, the company had built its road from Chicago to Byron, a distance of eighty-nine miles. Suit was commenced in this court in May, 1876, to foreclose the mortgage, and in May, 1879, the property and franchises were sold, subject to redemption, under a decree previously entered, to John I. Blair and others, for $916,100. On the second day of April, 1880, the company, with the approval of its stockholders, leased its railway and other property, including its franchises, to the Chicago, Milwaukee and St. Paul Railway Company for 999 years. In addition to the foregoing facts, the lease contained the following recitals:

"Whereas, certain other parties to whom the said party of "the second part (the Chicago and Pacific) was so as afore- "said indebted, have prosecuted their several demands in the "Superior and Circuit courts of Cook county and other courts "of the State of Illinois, and have procured divers judgments "thereon which now remain unpaid and unsatisfied of record, "and are a lien upon the property of the said party of the first "part, and other of said demands still remain unliquidated, and "whereas, the said party of the second part, at the request of "the said party of the first part (the Chicago, Milwaukee and "St. Paul company), now proposes to aid the party of the first "part in procuring a sufficient sum of money to redeem said "property from the aforesaid sale, and to protect said property "from all the aforesaid valid judgment liens, and also to extend "and construct the road of said party of the first part to the "Mississippi river; also to secure all proper and necessary "terminal facilities and depots and grounds along the line; also "to relay that part of the road already constructed with steel "rails, and to fully equip said road with all necessary rolling- "stock, so as to make the entire line a first-class railroad in all "respects, the entire or aggregate cost of which is estimated "at three millions of dollars, for which said sum the parties

"hereto, by their proper officers, propose to execute their joint "and several bonds of one thousand dollars each, bearing date "the second day of April, A. D. 1880, and becoming due and "payable on the first day of January, A. D. 1910, bearing in- "terest at six per cent. per annum, payable semi-annually, viz: "on the first day of January and July of each year, at the of- "fice or agency of the party of the second part, in the city of "New York, which said bonds are to be secured by a trust "deed or mortgage, of even date with said bonds, of all the "railroad franchises and other property of the party of the "first part, to the Farmers Loan and Trust Company, of the "city of New York; and whereas, the said party of the sec- "ond part, proposes to take up, pay, cancel, and satisfy all of "said bonds, at their maturity, and to meet, pay, and satisfy all "the accruing interest on said bonds as the same shall become "due and payable according to the tenor thereof, and forever "save the said party of the first part harmless therefrom, and "also to pay all taxes, charges, or assessments imposed or as- "sessed, or which may be hereafter imposed or assessed, upon "the property or premises of the party of the first part."

Concurrently with the execution of this lease, the two companies executed a joint trust deed upon all the property of the Chicago and Pacific company to secure the payment of 3,000 $1,000 six per cent. bonds, all of which, after being duly executed by both companies, the Milwaukee company received. The receiver, who had been in possession since the foreclosure suit was commenced, was discharged on June 28, 1880, at which time the Milwaukee company entered into possession of all the leased property, and has since continued in possession. This company redeemed the property from the foreclosure sale, extended the road to the Mississippi river at Savannah, where it constructed a bridge across the river; secured all necessary terminal facilities, depots and grounds along the line;

relaid the road between Chicago and Byron with steel rails, and fully equipped the road with necessary rolling stock, and has ever since operated it as part of its line between Chicago and Omaha, as a first-class railroad. It did not, however, keep that part of its agreement which required it to protect the leased property from all existing valid judgment liens. The money that was paid to redeem from the sale under the decree of foreclosure was accepted by the purchasers.

On the 9th of March, 1876, Horace A. W. Tabor recovered a judgment in this court against the Chicago and Pacific company for $3,499.73, and on the 3d of April, 1882, the Third National Bank of Chicago recovered a judgment in the same court, against the same defendant and others, for $36,165.36—the latter judgment being for money lent to the last named company before the execution of the lease. On June 25, 1881, the marshal sold the Chicago and Pacific road to Albert Keep for $4,822, on an execution to satisfy the Tabor judgment, and delivered to the purchaser a certificate of sale. Keep, who was president of the Chicago and North-Western Railroad Company at the time of the purchase, sold and assigned this certificate to Alexander Mitchell, who then was and still is president of the Milwaukee company. On the 25th of September, 1882, the Third National Bank, as a judgment creditor of the Chicago and Pacific company, paid to the marshal $5,304.20 to redeem from the last named sale, and Mitchell accepted the money and receipted for it. The bank was proceeding to enforce its supposed rights as a junior creditor, under the laws of Illinois, by a sale of the property, when this suit was commenced—in October, 1882—and the sale and further proceedings were temporarily enjoined on the authority of *Hammock* v. *Loan and Trust Co.*, 105 U. S., 77, which, it was assumed, held that the property and franchises of a railroad company could

not be sold on an execution to satisfy a judgment at law. The bank filed its answer and cross bill. After reciting the facts, the cross-bill prayed that the bank's judgment, and the amount paid to redeem from the sale under the Tabor judgment, be decreed to be a lien upon the property of the Chicago and Pacific company; that the court take possession of all such property, operate it by a receiver, and out of the earnings pay the amount due the bank. Testimony was taken, and the case is now before the court on final hearing.

The Tabor judgment was taken in this court before the foreclosure suit was commenced, and it was a valid lien upon the property of the Chicago and Pacific company, within the meaning of the lease, when that property was surrendered to the Milwaukee company. It was necessary to redeem from the foreclosure sale, and thus get rid of the trust deed executed in 1872, and the decree foreclosing it, before executing the lease and the joint bonds and the trust deed to secure them. The Tabor judgment was a lien, second only to the lien of the foreclosed trust deed, and when the lien was discharged, as it certainly was, by the payment and acceptance of the redemption money, the Tabor judgment, so far as the pleadings and testimony show, stood as the first lien. The Milwaukee company agreed to protect the leased property against all valid judgment liens. The Tabor judgment was such a lien, and the obligation to pay it was no less binding than the obligation to do the other things specified in the lease as part of the consideration of its execution. It is not material, therefore, whether the Milwaukee company agreed to protect the leased property against the Tabor judgment or not, as that company could not hold and operate the property for its own benefit in disregard of the rights of Tabor or his assignee.

The bank commenced its suit against the Chicago and Pacific company on February 19, 1880, before the execution of

the lease and the last trust deed—the property then being in the custody of the court—and took its judgment on April 2, 1882, which was after the Milwaukee company had taken possession under the lease. It follows that the latter company was not bound by its covenant to pay this judgment or the debt for which it was taken.

Being embarrassed and without credit, the Chicago and Pacific company was authorized to dispose of its property, as it did in the above arrangement, for the purpose of having the Milwaukee company to do what it, the Chicago and Pacific company, was unable to do; there being nothing in that arrangement, if fairly carried out, which could prejudice creditors. It was estimated that the bonds would enable the lessee company to redeem from foreclosure sale, pay all existing judgment liens, complete the road to the Mississippi river, relay the portion already in operation with steel rails, procure necessary facilities, depot grounds, etc., and fully equip the entire line. The fund arising from the sale of the bonds was to be used for these, and no other, purposes. Any diversion of it, or any part of it, to other objects or purposes was not permitted by the contracts. The road was to be completed to the Mississippi river, not to and across the river.

If the entire proceeds of the bonds had been expended in accordance with the terms of the lease, the bank's debt for the money which it lent to the Chicago and Pacific company could not be asserted in law or equity against the Milwaukee company or the leased property in its possession. The record shows, however, that the latter company did all the terms of the lease obliged it to do, except paying the Tabor judgment, and still had in the treasury a sum sufficient to pay for constructing a bridge across the Mississippi river. The amount due the bank, including the Tabor judgment, should have been paid out of the surplus. The cost of the bridge is not shown by the record, but we may safely assume that it exceeded the

bank's demand. The Milwaukee company contends that, as lessee, it was entitled absolutely to the entire issue of bonds, and that any surplus remaining after making necessary expenditures in fulfillment of its contract it could rightfully use in bridging the Mississippi, or in any other way, for its own benefit. It is admitted that the proceeds of the bonds paid for building the bridge, and it is not shown that the Milwaukee company expended the entire proceeds, or any amount equal thereto, in the manner and for the purposes specified in the lease.

Mr. Edwin Walker, the sole witness in the case, is president of the Chicago and Pacific company, and general solicitor for the Milwaukee company. He testified that the former company had no property but the leased property which had greatly increased in value; that it was in receipt of no income or earnings; that no separate account of the earnings of the leased property had been kept, and that, while he did not know that he could furnish a statement of the precise manner in which the proceeds of the bonds had been expended, he knew the entire amount had been paid out in redeeming from the foreclosure sale, in completing the construction of the road to the Mississippi river, in bridging the river, and in purchasing rolling-stock and terminal facilities.

The creditors of the Chicago and Pacific company, whether holding judgment liens or not upon that company's property when the lease was executed, were entitled to payment out of any remnant of the fund which remained in the treasury of the Milwaukee company.

A decree will be entered, requiring the Milwaukee company to pay into court, within thirty days, a sum sufficient to satisfy the bank's demand, including the Tabor judgment, and, failing to do so, the bank may move the court for the appointment of a receiver to take possession of the leased property and operate it until the amount due the bank is paid out of the earnings, or for any other appropriate relief.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1889.

No. 174.

THE C., M. & St. P. R. W. COMPANY,
Appellant,

vs.

THE THIRD NATIONAL BANK OF CHICAGO,
Appellee.

APPELLEE'S BRIEF IN REPLY TO APPELLANT'S BRIEF.

JOHN H. THOMPSON,
OF COUNSEL FOR APPELLEE.

HUNTINGTON W. JACKSON,
SOLICITOR.

BARNARD & GUNTHORP, LAW PRINTERS, CHICAGO.

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APPELLEE'S BRIEF IN REPLY TO APPELLANT'S BRIEF.

ERRORS ASSIGNED.

The errors assigned by appellant may be considered under three heads:

1. The first and second errors are based upon the leave given to file a cross-bill and the overruling of the demurrer to the cross-bill.

2. The third, fourth and fifth errors rest on the facts that the court allowed the appellee to amend the cross-bill, and refused leave to appellant to answer amendments.

3. The sixth error claims that the findings and decree are not supported by the evidence.

I.

THE CROSS-BILL.

Horace Tabor recovered a judgment in the United States Circuit court against the Chicago and Pacific Railroad Company and the road and property of the company were sold upon an execution issued on this judgment, and the certificate of sale was then held by Alexander Mitchell then president of the Chicago, Milwaukee and St. Paul Railway Company.

The Third National Bank recovered a judgment in the same court against the same company, issued an execution thereon and as a judgment creditor redeemed from the sale made under the first execution, and the United States marshal was proceeding to advertise and sell the property in accordance with the laws of the State of Illinois.

Then the two railroad companies filed the bill in this cause to prevent the appellee from collecting its judgment in this way and asking that the marshal might be enjoined from making sale of said property under execution.

The court granted an injunction and refused to dissolve it, but saying, "I have no doubt but when the complain-"ant comes into this court and asks relief against the "exercise of the right of sale under execution it should "be prepared to show some way in which the execution "creditor may be paid or satisfied the amount of the in-"debtedness shown to be due." The court then suggested that the proper method would be for the defendant to file a cross-bill and ask that the railroad property be placed in the hands of a receiver for the purpose of working out the payment of the indebtedness.

The appellee then filed its answer, obtained leave to file and filed this cross-bill.

The bill was filed to stay the collection of appellee's judgment by sale on execution of certain railroad property.

The cross-bill was filed to enforce the collection of the same judgment, and the money appellee had paid for redemption of said property from the other sale, out of the property of said railroad company, in another way than by sale on execution.

Can there be a case where the cross-bill is more nearly related to the original bill?

The bill set out the judgment of appellee, the issue of execution, admitted that the title to the property was in the Chicago and Paeific Railroad Company, but claimed that it was leased to the Chicago, Milwaukee and St. Paul Railway Company, and was incumbered by an issue of bonds, was operated as a public highway, and that the sale would work irreparable injury to complainants.

The cross-bill set out the same judgment of appellee and the claim of the appellee for having redeemed the property of the railroad company from the former execution sale, which was merely auxiliary to its judgment, and sought to have the judgment and redemption money made a lien on the railroad property and the payment enforced by appointment of a receiver.

In *R. R. Cos.* v. *Chamberlain*, 6 Wall., 748, a bill was filed to set aside a judgment and lease. A cross-bill was filed by owner of judgment to have the judgment decreed a valid lien on the railroad, appurtenances and franchises, and to have them decreed to be sold to satisfy

the judgment. The cross-bill was dismissed for supposed want of jurisdiction.

This court held that the court erred in dismissing the cross-bill, that it was filed for the purpose of enforcing the judgment and was "ancillary to and dependent upon "the original suit. An appropriate proceeding for the "purpose of obtaining satisfaction."

How does this case differ from that at bar?

In one case the bill is filed to set aside the judgment and the cross-bill to enforce it. In the other the bill is filed to prevent the judgment being collected in one way, and the cross-bill to enforce the collection in another.

Clay v. *Wickliffe*, 1 Dana, 585.

Henry Clay filed a bill to enforce a lien which he asserted resulted to him in equity in consequence of a certain contract.

Held that Wickliffe had a right to make his answer a cross-bill, and retort a converse prayer for a rescission of the contract, and for an adjustment of all consequential rights and liabilities, whether legal or equitable, and that Clay's subsequent dismissal of his bill did not affect Wickliffe's cross-bill.

We were seeking to enforce the lien of a judgment by sale on execution.

The bill was filed setting up our judgment and seeking to prevent us from enforcing the lien and collecting the judgment. The cross-bill was to enable us to enforce our lien and collect our judgment, together with the claim as a redeeming judgment creditor which was auxiliary to our judgment.

Matters auxiliary to the cause of action set forth in the original libel or bill may be included in the cross-suit.

The "Dove," 91 U. S., 381.

Counsel for appellant says that his bill was simply to restrain the *unlawful sale* of a railway under an execution —that it was to restrain the defendant from doing an *unlawful act*.

When and where has it ever been held under laws like those of Illinois, that the sale of a railway on execution was an unlawful act? Certainly not in this court, which has repeatedly recognized the validity of sales of railroads made on executions.

Galveston Railroad v. *Cowdrey*, 11 Wall., 459.

State of Florida v. *Anderson*, 91 U. S., 667.

Did the court grant the injunction on the ground that the sale upon execution was an unlawful act?

The court spoke of it as a "right of sale under exe-"cution," said that it could, perhaps, "say that it would "not continue the injunction in force unless the complain-"ant would furnish a bond or security for the payment "of this debt within some reasonable time," but expressed the opinion that the proper course would be to file a cross-bill.

In a case arising under the laws of another state, where the railroad had no title in fee, and had merely a right of way and the laws of the state did not provide for sale of such right of way, the right to sell the railroad property on execution was properly questioned, but in that case it was expressly stated that it was not necessary to discuss the general question as to the right to

levy an execution at law on property owned by a railroad company in fee.

E. Alabama R. R. Co. v. *Doe*, 114 U. S., 340.

In no state with laws similar to those of Illinois, has the sale of a railroad on execution been held an unlawful act, and in many states the right to sell a railroad on execution at law is settled law.

See cases cited in appellee's first brief, page 37.

The most frequent use of a cross-bill in the State of Illinois, has been in cases where bills have been filed to enjoin a sale under a power. Until recently in Illinois, nearly all mortgages and trust deeds have contained a power of sale. When a sale has been advertised under such power, the mortgagor or owner of the property has often filed a bill to restrain the sale, on the ground that proper notice had not been given, or that circumstances made such sale inequitable, or that the sale would work an irreparable injury, or something of that kind. When the complainant obtained an injunction against the sale, the mortgagee has generally filed a cross-bill to have his mortgage foreclosed in chancery.

The cross-bills which have been maintained in such cases in the courts of Illinois during the past forty years might be counted almost by hundreds, and yet according to the theory of the learned counsel for appellant, they were all wrong and should never have been allowed. In these cases the complainant was only seeking to restrain a sale—an "unlawful act." The cross-biil is not germane because it seeks something else than a sale.

This is the theory of the counsel. The theory of the courts has been that the bill was filed to prevent the foreclosure of the mortgage by sale under the power, and

that the cross-bill was a proper remedy for the foreclosure of its mortgage in another way.

So in this case the bill was filed to prevent the collection of a judgment by a sale on execution. The cross-bill is to enable the judgment creditor to enforce the collection of the judgment in some other way.

If the theory of the counsel is adopted by the courts there will be an end of cross-bills. There was never a cross-bill sufficiently germane to the original bill to meet his requirements.

II.

AMENDMENTS OF CROSS-BILL AND REFUSAL OF LEAVE TO FILE ANSWER TO AMENDMENTS.

The allowing and refusal of amendments to the pleadings is a matter largely within the discretion of the courts trying the cause. That court is in the position to judge best of the necessity or propriety of allowing such amendments.

It seems that in England a cross-bill is treated with particular favor in the matter of amendments.

In *Severn* v. *Flecher*, 1 Simons, 457, defendant filed a cross-bill for discovery. After the hearing of the original cause defendant amended his cross-bill by praying relief. Held that he was at liberty to do so, the vice-chancellor saying: "A cross-bill is to be treated with "greater indulgence than an original bill."

In *Harding, Admx., et al.* v. *Boyd*, 113 U. S., 746, the subject of amendments is discussed so fully and clearly that it is unnecessary to cite other cases.

The facts about these amendments are these:

All the evidence offered on the hearing was taken and filed in court more than a year before the hearing.

The hearing of the cause was commenced on the 24th day of November, 1885, and on that day the complainant in cross-bill moved the court "to amend its cross-bill "so as to conform to the testimony in the record." The defendants in cross-bill objected to such amendment, and the court took the motion under advisement. (Rec., 48.) On the following day the hearing of the case was finished and the case taken under advisement. (Rec., 48.)

The court having afterwards announced his opinion, the parties met the court on the first day of February, 1886, for the purpose of settling a decree, and a draft of a decree was then presented.

Upon a suggestion of the court that complainant in cross-bill was entitled to the relief given in the proposed decree under the general prayer for relief, the counsel said they would not insist upon their motion for leave to amend, but the counsel for appellant wanting time to present formal objections to the decree, the whole matter was postponed. (Rec., 49.) The counsel for cross-complainant did not withdraw their motion for leave to amend.

On the 15th day of February, 1886, the parties met the court again, and counsel for complainant in cross-bill insisted upon being allowed to amend the cross-bill, and the court saying that the amendments might be filed they were then filed, and the counsel for appellant filed objections to the decree and had an order entered making the injunction against sale on execution perpetual, and the case went over again. (Rec., 49, 50, 51, 52.)

On March 1, 1886, parties met the court again, leave was given to the cross-complainant to amend its bill as

prayed at the commencement of the hearing, to conform the pleadings to the evidence in the record. The defendants in cross-bill then asked leave to file an answer to the amendments, which was denied, and the decree was then entered. (Rec., 53–58.)

AMENDMENTS TO CROSS-BILL.

First is an allegation of the lease, trust deed and sale of the bonds, and that the proceeds of the bonds were received by the Chicago, Milwaukee and St. Paul Railway Company, and that the consideration of the lease was that this company should aid the Chicago and Pacific Railroad Company in procuring a sufficient sum of money to redeem the property of the Chicago and Pacific Railroad Company from the sale on foreclosure, to pay all judgments and demands, and to construct the road to the Mississippi river, and equip the road. (Rec., 49, 50.)

The original bill alleged the making of said lease and trust deed. (Rec., 3.)

Attached to the bill and made part of it, were the resolutions of the Chicago and Pacific Railroad Company, from which it appears that the Chicago, Milwaukee and St. Paul Railway Company proposed to aid the Chicago and Pacific company to procure a sufficient sum of money to redeem from the foreclosure sale, protect the property from judgment liens, finish the road to the Mississippi river, and equip the road at an estimated cost of three millions of dollars. (Rec., 8.)

The lease in evidence showed the foreclosure sale, and that the Chicago and Pacific company were indebted upon divers judgments and unliquidated demands, and that the Chicago, Milwaukee and St. Paul company proposed

to aid the Chicago and Pacific company in procuring a sufficient sum of money to redeem from the foreclosure sale, pay said judgments, etc. (Rec., 36.)

So these allegations of the amendments are substantially contained in the original bill and amply shown in the proofs.

The cross-complainant in its amendments next alleges the redemption from the foreclosure sale, and the completion of the road to the Mississippi, and the possession of the road by the Chicago, Milwaukee and St. Paul company, and that this company has not paid the judgment of the cross-complainant or the Tabor judgment out of the proceeds of the bonds, and instead thereof has used a large portion of such proceeds in building a bridge across the Mississippi. (Rec., 50.)

The original bill alleges "that in consideration of a "lease of said Chicago and Pacific railroad to the said "Chicago, Milwaukee and St. Paul Railway Company, "said last named company should advance the necessary "sum required for the redemption of their property," etc. (Rec., 3.)

The bill also alleges "that said lessee" (The Chicago, Milwakee and St. Paul Railway Company), "with the "means provided by the execution of said last-named "trust deed and bonds, and the proceeds of the sale "thereof, by and with the consent of your orator, the "Chicago and Pacific Railroad Company has completed "the construction of the entire road authorized by its "charter, from the city of Chicago to the Mississippi "river, and has also constructed a bridge across the "Mississippi river at or near Savanna." (Rec., 4.)

So these allegations are substantially contained in the

original bill, except the charge that the St. Paul company has not paid the judgments. These allegations are established by the proofs. Mr. Walker testifies:

"For the purpose of raising a sufficient amount of "money to redeem the property from sale a new mort- "gage was executed, and bonds to the amount of $3,000,- "000 were issued under the mortgage." * * * "The "$3,000,000 first mortgage bonds, issued under the "mortgage in 1880, were sold at a little less than their "par value." * * * "The whole amount of the "$3,000,000 bonds has been expended in the completion "of the road, *construction of a bridge across the Missis-* "*sippi river*, and in the purchase of rolling stock and "terminal facilities." (Rec., 31.)

The cross-complainant then charges in his amendments that, by the arrangements between the two companies, and by its acceptance of the lease, and the use and enjoyment of the property, and by the receipt of the proceeds of the bonds, the St. Paul company was bound in law and equity to apply enough of the proceeds of the bonds to pay and satisfy the two judgments. (Rec., 50.)

This is a charge based mainly on the allegations of the original bill, and upon the proofs.

In the cross-bill complainant had prayed that complainant's judgment, with the amount paid by it as judgment creditor for redemption of property of the Chicago and Pacific Railroad Company, from the sale under the Tabor judgment, might be decreed to be an equitable lien upon the property of the Chicago and Pacific Railroad Company, that a receiver might be appointed and the road sold, etc., and then there was a prayer for further and other relief. (Rec., 23.)

In the amendments was added a prayer that the St. Paul company might be decreed to pay the amount paid by the cross-complainant on redemption of the property from the sale under the Tabor judgment, and the amount of its judgment, with interest and costs. (Rec., 50)

This relief might, perhaps, have been given under the general prayer for relief.

These amendments were presented at the commencement of the hearing, and leave to make them was then asked. The right to amend pleadings to conform to the proofs is so clear, and so seldom, if ever, denied, that appellant's counsel ought to have consented to the amendments being made, and if he wished to file any answer, to have then obtained leave, and if he wished for time to produce further evidence, to have asked for it then.

No evidence was offered by the appellant and excluded, no pretense was made that he had any other evidence to offer except what was admitted.

Counsel calls our amendment a "surprising" amendment. It is not clear in what sense he uses the word "surprising." The amendment is based upon the facts in evidence. These facts are, indeed, "surprising." That this great railroad company, after acquiring a lease of the Chicago and Pacific railroad for 999 years, and making an arrangement by which it was to aid the Chicago and Pacific railroad in obtaining a sufficient sum of money to pay off all its liens and liabilities, and after obtaining such sum for such purpose should neglect to pay off such liens and should use a large portion of the money received for the very purpose of removing such liens for its own use and benefit, is indeed surprising. But that there was any surprise to the appellant or its counsel it is diffi-

cult to comprehend. The facts came from the counsel himself, mainly; some of them were alleged in the original bill, and the relief which was asked and given was insisted upon on the hearing and in the argument.

Complainant, in its cross-bill, had prayed for the appointment of a receiver, *etc.*, and for a sale of the property of the Chicago and Pacific Railroad Company to satisfy its claim, and there was a prayer for general relief.

In the amendments was added a prayer that the Chicago, Milwaukee and St. Paul Railway Company might be decreed to pay the claim.

In the decree it is decreed that the Chicago, Milwaukee and St. Paul Railway Company pay the claim within a certain time, and on its failure to do so the complainant in the cross-bill is given leave to move for the appointment of a receiver, *etc.*

The relief asked in the amendment is no hardship upon the appellant. The relief prayed for in the original cross-bill would be better for us than the relief given under the amendment. If the appellant does not choose to pay the claim we have no remedy except to apply to the court for just the relief asked in the original bill.

The relief prayed for in the amendment is not as harsh as that in the original bill, and if appellant prefers to have us remitted to the relief sought in the original bill it has only to decline paying the claim.

Is the relief asked in the amendments any new or different relief?

The cross-bill sought to enforce payment of appellee's claim out of the property of the Chicago and Pacific railroad, all of which had been transferred to and was in

the use and enjoyment of the appellant, and the specific relief asked was the appointment of a receiver and sale of this property. When the proofs showed that moneys had been raised on this property and received by the appellant, which ought, in equity, to be applied in payment of this claim, was it any new relief to ask for a decree against the appellant? The claim under this amendment was still to be paid out of moneys which were part of the property of the debtor and which were intended for payment of these claims and received for that purpose by appellant.

If a suit was brought against A and B to foreclose a mortgage on the property of A, and it was asked that the property be sold, and the proofs showed that A had placed in the hands of B a sufficient sum of money to pay the mortgage debt for the purpose of paying such debt, would it be any new relief to amend the prayer to ask for a decree against B, with the provision that in default of payment by B the property of A should be sold?

By any test which has ever been applied in a court of chancery, we were clearly entitled to make these amendments. They were merely to conform the pleadings to the proofs.

We did not abandon the case made by the cross-bill, or make a new or different case.

We did not encumber the record, nor increase the expenses of the litigation, nor complicate the suit, nor make new issues of fact, and the only additional relief we prayed was fairly included in our original prayer, and might perhaps have been given under our general prayer for relief.

Answer to Amendments.

When our amendments, asked at the commencement of the hearing, had been finally allowed, and just as the decree was about to be entered, appellant presented an answer to our amendments, which the court refused.

The only material allegations in this answer are, that appellant never assumed to pay the Tabor judgment or appellee's judgment, and that it had expended in furnishing means for the redemption from the foreclosure sale, and in other ways, more than the amount of money resulting from the sale of the bonds, and "that it advanced "the said Chicago and Pacific company, for the redemp- "tion of its said property and the payment of costs and "expenses connected therewith, about the sum of "$1,100,000, and in addition thereto it has been com- "pelled to pay, satisfy and discharge all the deficiency "decrees heretofore entered by this court in said fore- "closure proceedings—about the sum of $400,000, and "has also paid, discharged and satisfied a large number "of judgment liens existing and in full force at the time "(of the) execution of said lease, amounting to about "the sum of $200,000, and that the aggregate amount "expended by this cross-defendant in and about the mat- "ters hereinbefore referred to is about the sum of "$4,000,000;" and then follows an argumentative allegation that even if a portion of the proceeds of the bonds were used in the construction of the bridge, it was not a fraud upon the creditors of the Chicago and Pacific company.

This answer was presented without any statement or pretense that appellant desired to introduce any evidence in support of its or in the case.

How far these glittering generalities *about* large sums paid out are from the truth, may be seen from the first item.

The exact day of redemption from the foreclosure sale may not be shown by the record, but the lease was executed April 2, 1880, and the whole arrangement appears to have been made on the 1st or 2d day of April. The appellant advanced the money for the redemption at once, and was reimbursed afterwards by sale of bonds, so that it is quite certain that the redemption was made as early as April 3d. The road was sold May 1, 1879, for $916,100. On redemption it was necessary to pay this sum and interest from day of sale to day of redemption. The interest from May 1, 1879, to April 3, 1880, would be $67,791.40, making the amount to be paid on redemption $983,891.40. There was probably a charge of about fifty cents for recording a certificate of redemption, but we know of no other costs or expenses necessary.

In the original bill filed by the two companies, which is sworn to, it is stated that the appellant about April 1, 1880, undertook to advance the sum required to redeem from the foreclosure sale, and that the sum required amounted at that time to about one million dollars ($1,000,000). This was a liberal statement of the amount, as it was more than $16,000 above the amount required for the redemption, but when appellant came to state the amount in its proposed answer one hundred thousand dollars more was added. "O, monstrous! eleven buckram men grown out of two."

After undertaking to state the way the $3,000,000 was paid out, and reaching with such gross exaggerations *about* $1,700,000, appellant stops and does not undertake

to account for the other $1,300,000, but concludes with the gross statement that it expended altogether $4,000,000.

That no such sum was ever expended is quite certain, for there was no other issue of bonds than the issue of the three millions. Railroads in our part of the country do not pay out any considerable sum of money without raising it by an issue of bonds. No evidence of any such amount was produced or offered; no pretense was made in court that appellant could prove any such thing.

The amount required for redemption from sale, payment of judgments, completion of road, etc., was estimated at $3,000,000. Such estimates are always liberal estimates. The amount required for the redemption could be fixed to a dollar; the amount of the judgments could be easily ascertained; the cost of completing the end of the road could be ascertained with approximate certainty by the railroad men. There might be some uncertainty as to the unliquidated claims, but the parties were pretty sure to make their estimates large enough to cover everything. The evidence showed that the estimate was large enough, and that out of the proceeds of the $3,000,000 the appellant built a railroad-bridge across the Mississippi.

We tried very hard to find out just how the $3,000,000 was expended.

Mr. Walker testified on behalf of complainants that it has been expended in the completion of the road, construction of a bridge across the Mississippi river, etc. (Rec., 31.)

On cross-examination he was asked if he could furnish, or have furnished a detailed statement of the man-

ner in which the $3,000,000 raised by the bonds and mortgage referred to has been expended. He answered:

"I don't know whether I could obtain that statement "or not, I think it would be very difficult to furnish a de- "tailed statement," etc., and after stating various ways in which the money had been expended, including the building of a bridge across the river, he said:

"*I don't think it would be possible for me to show in de- "tail how the money was expended.*" (Rec., 34.)

There is not a word of evidence to support this surprising allegation about the $4,000,000. No such evidence was ever offered, there was no pretense that there was any such evidence in existence. The judge, before whom the case was heard, would have opened the case at almost any stage to admit any material evidence offered in good faith.

But even if this allegation was true, and evidence had been produced to support it, as it was not, it would still have been no defense to our claim. This answer was properly refused.

This answer, bearing on its face the evidence of gross exaggerations, not necessary to enable appellant to introduce any evidence he may have been able to introduce in the case, not accompanied by any affidavit or even statement or pretense that he had any evidence to introduce to support its allegations, of no earthly use to appellant, except for the purpose it is now sought to be used for in this court, and offered at the moment the decree was about to be entered, was properly refused.

III.

EVIDENCE SUPPORTING DECREE.

When counsel for appellant comes to the forty-first page of his brief, after an elaborate discussion chiefly of matters of relationship, he devotes five pages to the evidence.

As to the money paid by the appellee for redemption as judgment creditor from the sale under the Tabor judgment, he says: "There is not in the whole record a "scintilla of evidence warranting the decree.

"There is no evidence whatever, either direct or indi-"rect, to support this portion of the decree."

These are brave words to be written of a claim sustained by the carefully considered opinion of a judge so able and fair, and anxious to decide a cause upon its just and substantial merits, as the learned judge who heard this cause.

This Tabor judgment was recovered in the United States Circuit court, March 9, 1876, and execution was issued upon it within a year, so that it became from its date a lien upon all the real property of the Chicago and Pacific Railroad Company. The property of the company was redeemed from the foreclosure sale, and counsel says that all other judgments which were liens on the road April 1, 1880, have been satisfied. The Tabor judgment then became a first lien upon all the real property of the road.

By the strictest construction of the contract between these two railroad companies, this was one of the judgments which the appellant undertook to aid the other company in raising money to pay. A sum of money,

$3,000,000, was raised on the property of the Chicago and Pacific road, for the express purpose of paying this and other judgments, and for other purposes, and this money was received by the appellant.

Counsel asserts that appellant has paid all other judgments in force April 1, 1880. "This thou shouldst have "done, and not left the other undone." He admits appellant has not paid this. If a man is indebted on two notes, is it any answer for him, in a suit for one, to prove that he has paid the other?

With the proceeds of the $3,000,000 bonds in its hands, the appellant still neglected to pay this judgment and used a large portion of the $3,000,000 in building a railroad bridge across the Mississippi river, for its own exclusive use and benefit.

Tabor, unable to collect his judgment, in June, 1881, issued a pluries execution, and had it levied upon all the railroad of the Chicago and Pacific Railroad Company, including road-bed, station houses, depot grounds, rails, ties, fences, bridges, viaducts, culverts, etc., and June 25, 1881, the whole property was sold by the United States Marshal to Albert Keep, then President of the Chicago and North-Western Railroad Company. A certificate of sale was issued to the purchaser, under which he would be entitled to a deed of the property at the end of fifteen months, if the property was not sooner redeemed from the sale.

The judgment debtor had one year from day of sale in which to redeem the property. The property was not redeemed within the year.

By allowing one year to elapse without offering to redeem, the judgment debtor's rights are gone.

Blair v. *Chamblin*, 39 Ill., 521.
Massey v. *Westcott*, 40 Ill., 160.

About the end of the year, the certificate of sale was bought by and assigned to Alexander Mitchell, then president of the Chicago, Milwaukee and St. Paul Railway Company.

When a judgment debtor does not redeem within the year, any judgment creditor may redeem after the end of the year and before the expiration of fifteen months from the day of sale. The provisions in the laws of Illinois for such redemption may not be familiar to some members of the court, and are as follows:

SEC. 20. If such redemption is not made, any decree or judgment creditor, his executors, administrators or assigns, may, after the expiration of twelve months and within fifteen months after the sale, redeem the premises in the following manner: Such creditor, his executors, administrators or assigns, may sue out an execution upon his judgment or decree, and place it in the hands of the sheriff or other proper officer to execute the same, who shall endorse upon the back thereof a levy of the premises desired to be redeemed; and the person desiring to make such redemption shall pay to such officer the amount for which the premises to be redeemed were sold, with interest thereon at the rate of eight per centum per annum from the date of the sale, for the use of the purchaser of such premises, his executors, administrators or assigns; whereupon such officer shall make and file in the office of the recorder of the county in which the premises are situated a certificate of such redemption, and shall advertise and offer the premises for sale under said execution as in other cases of sale on execution.

SEC. 21. The creditor, his executors, administrators or assigns, having so redeemed, shall be considered as having bid at such sale the amount of the redemption money so paid by him, with interest thereon at the rate of eight per centum per annum from the date of such redemption to the day of sale, with the cost of such redemption and sale; and if no greater amount is bid at such sale the premises shall be struck off to the person making such redemption, and the officer shall forthwith execute a deed of the premises to him, and no further redemption shall be allowed.

SEC. 22. If a greater amount shall be bid and the premises sold for more than the amount of such redemption money, interest and costs, the excess shall be applied on the execution under which the redemption was made; and a certificate of the purchase shall be made to the new purchaser, in like form and manner as upon the first sale, for a deed of the premises so sold, in sixty days from the date of such sale unless the same are redeemed before the expiration of that time, by some other decree or judgment creditor, his executor, administrator or assigns.

SEC. 23. Successive redemptions may be made of the premises at any time within sixty days of the last sale at which they were sold for more than the amount of the redemption money, interest and costs, and the premises again sold in the same manner and upon the same terms and conditions, and certificate shall be made in like form and manner as upon the sale on the first redemption, and the person redeeming shall be considered to have bid the amount of his redemption money, interest and costs; and if at any such sale the premises are not sold for a greater sum, the sheriff or other officer

shall forthwith execute a deed to the purchaser, and no other redemption shall be allowed.

Starr & Curtiss, Ill. Statutes, Chap. 77, Secs. 20–24.

It will be seen that the term "redemption," as applied to this proceeding by a judgment creditor, is misleading. The proceeding is, in effect, a compulsory assignment of the claim and rights of the purchaser at the execution sale. The judgment creditor having issued his execution and had it levied, and having paid to the officer the redemption money, acquired all the rights of the holder of the certificate of sale, and stands in his shoes, with the additional obligation that he must have a sale made under his execution. If at that sale no more is bid than the amount of the redemption money, interest and costs, a deed is made forthwith to the judgment creditor. If more is bid a certificate of sale is issued to the purchaser and another judgment creditor has sixty days to redeem.

Here the appellee redeemed in accordance with these provisions of law, and thereby became the purchaser and owner of this property. The rights and interests of the Chicago and Pacific Railroad Company were gone. The appellee was bound to advertise and sell the property under his execution, and if on such sale he had obtained a deed, appellee would have had a title to the property, which would cut off the lease to appellant and the trust deed securing the bonds. The proceedings of appellee were stayed by the injunction.

Counsel says the sale on execution was unlawful. It is a little singular that Mr. Mitchell, the president of the Chicago, Milwaukee and St. Paul Railway Company, should have bought up the certificate of sale, if this was

so. But the sale was not and has never been held unlawful. Counsel says the redemption by appellee was a "mere business venture."

The appellee had a large judgment against this railroad company. The receiver was bound to use due diligence to collect it. The property of the company had been sold on execution. The debtor had failed to redeem from the sale. Mr. Mitchell held the certificate of sale, and would be entitled in a day or two to a deed which would cut off the bonds, and the lease and the lien of this judgment. There was but one thing for appellee to do, and that was to redeem as judgment creditor from this sale. It was no business venture but an honest effort to collect a just debt.

When the injunction was issued in this case, the appellee was the conditional owner of the Chicago and Pacific railroad. If it had been allowed to make sale on its execution and had bid the amount due on its judgment over the redemption money paid, and another judgment creditor had redeemed, appellee would have collected its judgment, and the money paid for redemption. If no other judgment creditor had redeemed, appellee would have had a deed giving title to the property and cutting off lease and bonds.

This is not all. Counsel, when testifying as witness in this case, offered, on behalf of the defendants in the cross-bill, to pay this Tabor judgment, principal, interest and costs. (Rec., 32.)

This was an admission of the justice of this part of our claim against the appellant.

And yet counsel asserts that to support this part of our

decree there is not a scintilla of evidence—no evidence whatsoever.

"Is this nothing?
Then the world and all that's in it is nothing."

As to the part of the decree based on the judgment of appellee, counsel says there is no evidence warranting this, but afterwards seems to admit that there is some evidence to support the findings of the court, and indulges in some captious criticisms of the proofs.

He complains that the fact that appellant built a railroad bridge across the Mississippi river out of the proceeds of the $300,000 bonds, is shown by his own testimony, which was "just about six lines," and he asserts that not another line in the whole record tends to show this fact, but he admits that he testified twice to this fact.

Counsel offered himself as a witness. He was well acquainted with these transactions. We considered him a competent witness. He testified twice to this fact. How many times must he testify to a fact before it can be considered proved? May not a fact be stated in six lines as well as sixty?

But counsel is not quite correct in saying that there is not another line in the whole record tending to show this fact. In the original bill of these two railroad companies is this allegation:

"That said lessee" (appellant) "with the means pro-
"vided by the execution of said last named trust deed
"and bonds, and the proceeds of the sale thereof, by and
"with the consent of your orator the Chicago and
"Pacific Railroad Company, has completed the construc-
"tion of the entire road authorized by its charter, from
"the city of Chicago to the Mississippi river, and has *also*

"*constructed a bridge across the Mississippi river at or*
"*near Savanna.*"

This allegation made in the bill was not denied in the answer.

When a fact is alleged in the bill, admitted in the answer, is further proved by a witness testifying to it twice, may we not consider it established?

Counsel says that the proof does not show the cost of the Mississippi river bridge.

The bill alleges that the appellant built this bridge with the proceeds of the bonds, and the proofs show the same thing.

We tried to find out how the whole $3,000,000 was expended.

It seems probable that the appellant might have furnished such evidence. We asked for a statement. Appellant never furnished it, and never offered any evidence to show how much of the proceeds of the bonds were used in building this bridge. We thought, however, that when we had proved that a railroad bridge across the Mississippi river, on a great trunk line between Chicago and Omaha, had been built out of this $3,000,000 we had proved enough. There are some things that a court may be presumed to know and which it may safely assume, and among them is the fact that a railroad bridge cannot be built across the Mississippi river between Illinois and Iowa for $42,000. Our claim did not exceed $42,000, and when we proved that a railroad bridge had been built across the Mississippi river out of the $3,000,000, we proved that more than the amount of our claim had been taken from that fund. It is generally known that the railroad bridge across the Ohio, now being built

by the Illinois Central, has cost several millions of dollars. The stately Mississipi is no creek or babbling brook, that a railroad bridge can be built across it for a few thousand dollars. Any court is warranted in assuming that the cost of such a bridge exceeds the sum of $42,000.

There are some unwarranted statements in appellant's brief which deserve notice.

It is stated that answer was filed and proofs taken, "no "question as to a trust fund, or the misappropriation of "a trust fund, being considered for a moment by either "side." (P. 37.)

Also, that "without either side's supposing the funds "used in the construction of a bridge had anything to do "with the issues, the hearing proceeded and was con- "cluded," etc. (P. 38.)

Counsel can speak for his own side; we cannot allow him to represent ours.

In the taking of the proofs, we regarded the diversion of a large portion of the funds raised for the use of the Chicago and Pacific Railroad Company an important and vital fact, and on the hearing and on the argument we maintained our right to a decree mainly upon the ground that the money which ought to have been used for the payment of the debts of the Chicago and Pacific company, were used by appellant for its own use. We regret our arguments made so little impression upon the counsel that he now seems oblivious of them, but we console ourselves with the fact that they seem to have made more impression upon the court.

On page 43, it is stated: "The record shows that the "finding and the decree of the court, the amendments to "the cross-bill and the exceptions to the draft of decree

"were all entered of record on the fifteenth day of Feb-
"ruary, 1886. As a matter of fact, the amendment to
"the cross-bill was not offered or suggested until after
"the court had formally made its finding of facts, and
"indicated the form of decree that should be enrolled."

It is difficult to see how such misstatements of facts could be made.

The record shows that the decree was entered on March 1, 1886.

The amendments to cross-bill were filed February 15th, but were not allowed until March 1, 1886. (Rec., 52, 55, 56, 57.)

As a matter of fact the amendments to the cross-bill were presented and offered in court on the 24th day of November, 1885, and leave to make the amendments was then asked on the first day of the hearing of the cause. (Rec., 48.)

Then there is the repeated statement and insinuation that the appellant was not permitted to introduce evidence showing how the $3,000,000 was used. (Brief, p. 41.)

The record does not show that any evidence offered by appellant was excluded or even objected to. If the appellant had offered a correct statement of the manner in which this fund was used it would have been to us as welcome as flowers in spring. There were more than three months after the hearing of this cause before the final decree was entered.

There is no other judge more willing than the judge who heard this cause, to receive any material evidence in disregard of any technical rules, and if any such evidence had been offered with any semblance of good faith, the

case would have been reopened and the evidence heard. No other evidence than that admitted was presented at the hearing or at any other time, no request was made for an opportunity to present such evidence, and no pretense was made in that court that appellant had any such evidence to offer.

The defense of appellant against our claims, as gathered from appellant's brief, seems to be this:

1. That appellant was only bound by its contract, as shown in the lease, to discharge the judgments in force at the time of making the lease.

2. That the Tabor judgment, although in force at that time, has since been satisfied by the sale on execution, and therefore does not concern appellant.

3. That the judgment of appellee, although recovered in a suit pending at time of making lease, was not rendered until after that time, and appellant is not therefore liable therefor.

We say that by the fair construction of the contract between these companies the appellant was bound to aid in procuring a sufficient sum of money to pay off and discharge not only all judgment liens existing at the time the lease was made, but all judgment liens which might afterwards exist upon the property of the Chicago and Pacific railroad, that a sufficient sum for this purpose was afterwards received by appellant, and that by the diversion and use for its own purposes of portion of this sum our right to relief against the appellant is clear.

The construction of this lease and the grounds on which we maintain our right to this decree have been already discussed in the first brief filed for appellee.

Appellant's Covenant to redeliver Premises.

In the express covenants in the lease on the part of appellant, is one to redeliver and surrender up to the lessee the premises at the end of the term or sooner determination of the lease. (Art., 111, Rec., 45.)

Does not this covenant impose upon appellant the obligation to satisfy and remove the lien of any judgment, recovered either before or after the making of the lease? The lien of any such judgment can be enforced by the sale of the property which appellant has covenanted to deliver to the lessee at the end of the term. The obligation of the appellant to redeliver this property necessarily includes the obligation to satisfy and remove all judgment liens upon it, and of itself warrants and sustains the decree.

Situation and Circumstances.

The situation of the parties, and the circumstances accompanying the execution of a contract, are often referred to and relied upon by a court in the case of doubtful or ambiguous language.

If there is any doubt as to the construction of the contract in this case, there are some facts connected with the situation of the parties and the circumstances attending the execution of this contract, which throw some light upon the intention and understanding of the parties.

In the making of the lease and trust deed the Chicago and Pacific Railroad Company recited the fact of all its indebtedness, showing that it had not forgotten its debts, and transferred all its property to the appellant for 999 years, and then joined with appellant in encumbering its

property for $3,000.000. It made no provision for payment of its debts, except by the lease and bonds. It reserved nothing, it kept nothing back.

Unless all the debts of the company were to be paid from the proceeds of the bonds, why were these debts mentioned, and why were not some of these proceeds reserved by the lessor?

Still clearer light is shown upon the construction of this contract by the acts of the Chicago and Pacific stockholders. They had negotiations with other corporations and parties, as alleged in the bill, but elected to accept the proposals of the appellant with such unanimity and enthusiasm that they must have looked upon the arrangement as a most advantageous one for them.

Mr. Walker testifies that at the meeting "nearly al the stock was represented," and that about nine-tenths of the stockholders voted for the resolutions.

It is quite clear that these stockholders looked upon this arrangement as one of great advantage. There was, of course, nothing for the present. The eyes of many generations of stockholders must grow dim and weary looking in vain for a dividend from a lease that pays not a dollar of rental. But if the construction of this contract be as we claim, if the appellant is bound under it to protect the property of the lessor from all judgment liens, and pay off all encumbrances, so as to deliver the property clear of all encumbrances and completed at the end of the term, there is a future for these stockholders.

It seems evident that the stockholders of the Chicago and Pacific understood the construction of this contract as we do, for on no other construction could they save their

road or obtain anything out of the arrangement. The conduct of the appellant since does not indicate that it understood the contract differently, but only shows that it disregards its solemn obligations, for it admits that it was bound to have paid off and satisfied the Tabor judgment, on its own construction of the contract.

Appellant's defense against our claims rests upon a narrow and wrong construction of the contract between these railroad companies. The theory that the satisfaction of the Tabor judgment by sale on execution relieves appellant from the obligation to pay this claim, is a fallacy, for while the judgment was satisfied, we hold in place of it a conditional title to the railroad, and our claim is placed beyond doubt by appellant's diversion and use, for its own purposes of money which should have been used for payment of our claim.

We respectfully submit that this decree should be affirmed.

JOHN H. THOMPSON,
Of Counsel for Appellee.

HUNTINGTON W. JACKSON,
Solicitor.